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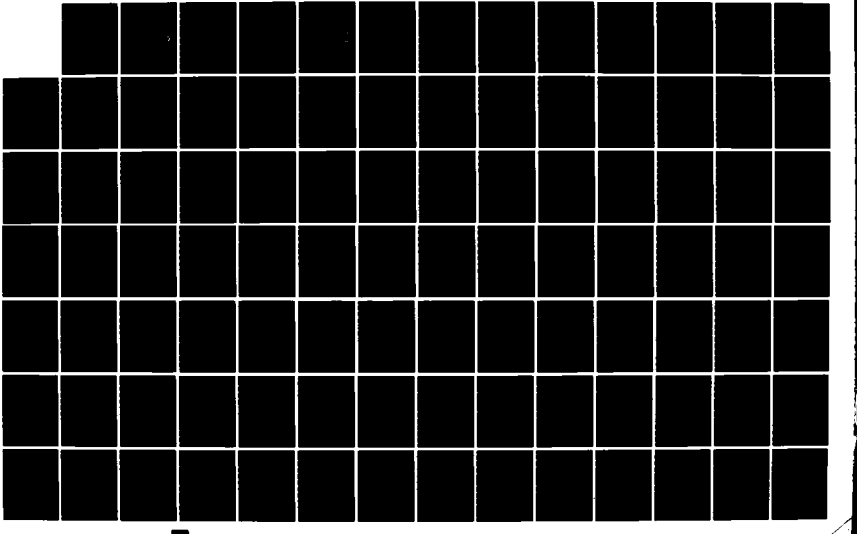

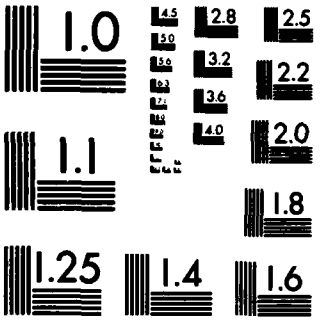

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Introduction

Contractors frequently encounter unanticipated difficulties in the performance of their agreements with the federal government which result in unexpectedly higher performance costs. These risks are of particular concern to the fixed-price contractor, who has agreed to perform a specified task for a certain, unvarying sum, because the fixed-price agreement allocates the risks to the contractor in the absence of an express contractual arrangement to the contrary. Legal rules do exist, however, to reallocate the risk to the government when certain conditions exist. Two such doctrines are affirmative misrepresentation and non-disclosure of superior knowledge.

Affirmative misrepresentation reallocates the risk when unanticipated difficulties are the result of a culpably false government representation which induces the contractor to follow a detrimental course of action. Non-disclosure of superior knowledge reallocates the risk when the government fails to disclose to the contractor information vital to contract performance which the contractor does not possess; in effect, the government stands to the side watching as the contractor unwittingly pursues a detrimental course of action.

The case law and the authorities are remarkably silent on the philosophical underpinning for these rules. Perhaps this is explained by the press of business faced by practical lawyers and judges who find it difficult to devote time to such analysis. Nevertheless, the wellspring of the rules is

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Government Affirmative Misrepresentation and Non-Disclosure of Superior Knowledge in Federal Contracting

By

Michael John Hoover

B.A. June 1971, Pennsylvania State University

J.D. May 1974, University of Virginia

A Thesis submitted to

The Faculty of

The School of Law

of the George Wahington University in partial satisfaction of the requirement for the degree of Master of Laws (Government Procurement Law)

September, 1984

Thesis directed by

Ralph C. Nash, Jr.

Professor of Law

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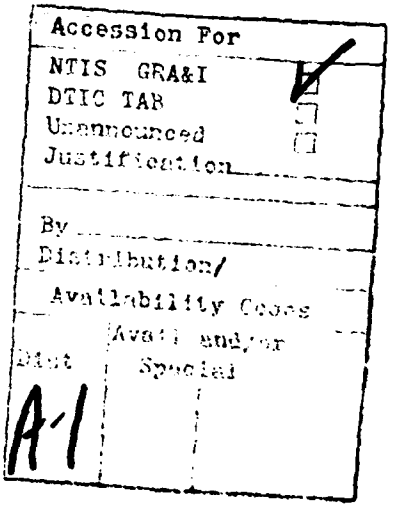

Introduction

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The case law and the authorities are remarkably silent on the philosophical underpinning for these rules. Perhaps this is explained by the press of business faced by practical lawyers and judges who find it difficult to devote time to such analysis. Nevertheless, the wellspring of the rules is

indubitably the requirement that the government treat in good faith and with fair dealing those it solicits to do its work.[1] These doctrines can be viewed as an attempt to introduce some civility to an arena that otherwise could become uncontrollably competitive. They, consequently, do not arise from any express undertaking by the government wherein it promises only truthful assertions and complete disclosure; rather, they are imposed by the operation of law. The cases speak of the rules as creating "implied duties" which, of course, is the legal way of saying the same thing.

For many years, affirmative misrepresentation and non-disclosure of superior knowledge travelled under the common rubric of "misrepresentation." The early cases said that a misrepresentation occurred when the government expressly or impliedly represented false information[2] as well as when it witheld superior knowledge[3] without attempting a serious distinction between the two situations. The cases do not provide a rationale for lumping these two concepts together; one reason, however, may be the traditional view that a failure to disclose information under conditions where a party would be expected to speak up is "equivalent to an assertion the fact does not exist."[4] This rationale which finds an assertion in non-disclosure is mere fiction and misleading too since it obscures the real differences which exist between the theories. Affirmative misrepresentation is operative only when the government has made an assertion. Precisely the contrary is true for non-disclosure of superior knowledge; it is operative

only when the government has not made an assertion, but is under an obligation to do so. This distinction is not merely academic; the discussion below will demonstrate it has practical effects on the elements which must be established for recovery under either theory and the content which is given to each element.

Perhaps in recognition of these differences, the Court of Claims in Helene Curtis Industries, Inc. v. United States, [5] a case which has all the earmarks of a landmark decision, provided an appropriate, independent legal footing for the theory of non-disclosure of superior knowledge. This case arose out of the Army's need for disinfectant chlorine powder for field troops in the Korean war. The prescribed disinfectant in the solicitation for bids had been developed as part of a special Army research and development project conducted in conjuncton with selected universities and private companies; therefore, the disinfectant was new and its properties essentially unknown. Of significance to the successful production of the disinfectant was the requirement that it be subjected to expensive grinding. This was known to the Army because of its previous experience with the disinfectant, but it was not revealed to the prospective bidders. The successful bidder, Helene Curtis, expended considerable time, effort and expense in discovering through trial and error during contract performance the requirement for grinding, as well as incurring additional costs in production once the grinding process was known. The result was a sizeable

loss on the contract. The court, in recognizing the right of Helene Curtis to recover, set forth the following framework of analysis for non-disclosure of superior knowledge:

> [A]t the time of the first contract (i) the Army knew that grinding (which is more troublesome and costly than mixing) would in all probability be necessary, not because the specification required that process but because the end-product could not in fact be made without it; (ii) on the basis of the data it had or should be expected to obtain, plaintiff reasonably expected that the job could be done by simple mixing, without grinding; (iii) the Army was aware that plaintiff (and most of the other bidders) expected to produce the disinfectant without grinding; (iv) the contract specification did not inform or alert plaintiff as to the probable need for grinding; and (v) the Army did not otherwise inform plaintiff of this fact.[6]

This formulation of the superior knowledge doctrine, with some subtle refinement discussed below, remains today as the proper framework of analysis for such cases.

Since the decision in Helene Curtis, affirmative misrepresentation and non-disclosure of superior knowledge have with very few exceptions been treated as distinct theories.[7] The conceptual and practical differences between them must be balanced with an understanding of their similarities, however. Both deal with the communicative process in federal contracting, albeit from different angles: affirmative misrepresentation deals with communication that is false, whereas non-disclosure of superior knowledge deals with the failure to communicate when there is a duty to do so. Moreover, both theories have elements which require government culpability, causation and detriment and which prevent the

reallocation of risk when the contractor's actions are not reasonable. This paper's discussion below treats affirmative misrepresentation and non-disclosure of superior knowledge as two different but related topics. An examination of the elements of each will be undertaken, and an attempt made to delineate appropriate similarities and differences.

Chapter 1: Affirmative Misrepresentation

A. Introduction

Affirmative misrepresentation occurs in myriad factual contexts.[8] Furthermore, it will arise in all types of federal contracting: construction, manufacturing, supply and services. Because the government often chooses to describe surface or subsurface physical conditions at a construction site and usually provides detailed construction plans, the majority of misrepresentation cases concern construction contracts.[9] The government will also frequently choose to represent matters relevant to the manufacture of goods or provide detailed design specifications and, consequently, the next most prevalent area of affirmative misrepresentation is manufacturing contracts.[10] Misrepresentation arises in simple supply and service contracts but not to the extent of construction and manufacturing contracts.[11] This is explained by the fact the government is usually not buying a unique item and has much less occasion to provide detailed design specifications as is the case in construction or manufacturing contracts, or the nature of the work is not closely tied to physical conditions at the government site as is the case in construction contracts. Misrepresentation is not restricted to contracts for procurement but occurs in contracts for the disposition of property as well.[12]

Misrepresentation as a theory of risk allocation benefits a contractor only when both of two factors are present: the contract does not assign to the contractor as his

sole responsibility the subject matter to which the misrepresentation relates and the contractor is able to establish the elements of misrepresentation.

WRB Corporation v. United States [13], which is the only misrepresentation case discovered dealing with the issue, illustrates the first proposition. This contract was for the construction of capehart housing on a military installation. The contract provisions required the contractor to pick adequate borrow sites and submit them to the contracting officer for approval. Instead, the contractor requested the contracting officer to designate borrow sites which the contracting officer did. The sites designated by the contracting officer turned out to be inadequate and borrow had to be obtained from another site much farther removed from the construction project than the original sites. The Court of Claims denied the contractor's claim, based on the contracting officer's misrepresentation that the original borrow sites were adequate, for the additional cost of obtaining borrow from the farther site:

> [I]t was clearly the responsibility of the plaintiff, under paragraph 1-7 of the contract specifications to locate and select the borrow areas. The defendant's personnel had no obligation to the plaintiff in this respect, except to act reasonably in the matter of approving or disapproving borrow sites located and selected by the plaintiff. When the contracting officer responded to the plaintiff's request for assistance in October 1958 by furnishing a map that showed a couple of prospective borrow areas, the contracting officer was rendering a gratuitous courtesy to the plaintiff, rather than discharging a contractual obligation that rested upon the defendant. The defendant is not chargeable with a breach of contract in connection with an act which is

> not required by the contract, which is done for the benefit of the contractor, and which is taken advantage of by the contractor.[14]

The court's opinion in this case reflects that misrepresentation is not actionable when the matter to which the misrepresentation relates is the contractor's sole responsibility under the contract terms and not the government's. Put another way, misrepresentation does not lie when the contractor has specifically assumed as part of his contractual undertaking all the risk of certain unanticipated difficulties relieving the government of any responsibility in the matter. In these circumstances, misrepresentation does not act to reallocate the risk to the government because a specific contractual provision provides otherwise. This differs from the typical misrepresentation case where there is not an agreement relieving the government of responsibility for the subject matter to which its representation relates.

Secondly, reallocation of the risk of unanticipated difficulties from the fixed-price contractor to the government will occur through application of the doctrine of misrepresentation only when the following elements are established: the government has made a representation to the contractor of material fact; the representation is false; the government is culpable in making the representation; the representation has caused contractor reliance; the contractor's reliance is reasonable; and, as a result of his reliance, the contractor has suffered some detriment. It is the contractor's

responsibility to establish these elements,[15] and once he has done so the misrepresentation is actionable. The overwhelming majority of misrepresentation cases concern one or more of these elements and the remainder of this chapter will be dedicated to an examination of them. The discussion below will look at each of these elements in detail and also address the remedies available to the contractor once an actionable misrepresentation has been proven.

B. The Representation of Material Fact

This section will be divided into five separate subsections. First, the definition of what constitutes an actionable representation will be considered; second the timing and manner of making the representation will be examined; third, those rules followed in resolving disputes over whether language used conveys an actionable representation or some other matter will be analyzed; fourth, the forms a representation may take will be considered; and fifth, an analysis of the interface of misrepresentation and warranty theory will be undertaken.

The central element in misrepresentation is that the government make an actionable representation. This is central because all the other elements of misrepresentation relate to it; for example, the element of falsity takes on no meaning by itself but is significant only as it relates to the falsity of the representation. The same is true of the other elements. A representation is an "assertion" of some matter [16] and an actionable representation, which is a special type of

representation as is explained more fully below, must be proven by the contractor as part of his case to establish misrepresentation.[17]

1. The Nature of the Actionable Representation

In some respects, the best way to understand what constitutes an actionable representation is not through the formulation of a precise definition but through an examination of those factors which the courts and boards have used in deciding whether a representation is actionable. By doing so, a better understanding of an actionable representation may be arrived at and some of the reasons for its requirements analyzed. It should be set forth at this point, however, that there is a difference between a representation and an actionable representation. A representation, as stated above, is an assertion of some matter; an actionable representation is a special type of representation, a subset of the larger world of representations, which the courts and boards recognize as necessary to establish a case of misrepresentation. As we shall see below, in the philosophical sense a representation is made when any matter, opinion, fact or conjecture, whether relevant or irrelevant to the reasonable person, is conveyed to the contractor by the government whereas an actionable representation for misrepresentation theory arises only from <u>the representation to the contractor by the government of a material fact.</u>

Conceptually, the element of the actionable representation may be subdivided into two subelements: the

communicative and informational subelements. The communicative subelement concerns the questions of what words were used in the representation, were they conveyed to the contractor and were they meant for the contractor. The informational subelement concerns the nature of the information communicated and whether it met the requirements for an actionable representation. The discussion of the actionable representation below will follow this conceptual construct. However, the discussion of the aspects of the communicative subelement as it relates to the words used and whether they were communicated to the contractor will be deferred until part three of this section on the existence and meaning of representational language because that section focuses on disagreements between the parties and these facets of the communicative subelement, to the extent they are discussed in the cases, are usually discussed in the context of disputes. The aspect of the communicative subelement as it relates to whether the representation was intended for the contractor will be discussed in this part as well as the two aspects of the informational subelement--assertions of fact and materiality.

a. The Assertion of Fact

An actionable representation arises only where the representation pertains to <u>fact.</u> The emphasis is on a statement of fact and not an assertion of some different character. If the assertion is not of fact, it will not constitute an actionable representation.[18] An assertion of fact can be defined as a statement with certainty, and without

qualification, of the present existence of some matter.[19] To the extent there is litigation in government contracts over the factual nature of an assertion, it seems to be over whether an assertion is a statement of fact on one hand or a contractual requirement or an opinion on the other. These are discussed in turn below.

A contractual requirement is a contractual goal to which a contractor is obligated to perform. A contractual requirement will not constitute an actionable representation. An example is given by the Housing and Urban Development Board's decision in W.G. Thompson, Inc. [20] This contract was for caulking at a government housing project. The "workmanship" specifications provided the contractor was to, "C. Thoroughly and completely remove all existing caulking. Remove all backing that would hinder the watertightness of the joint." The contractor alleged this language represented that all joints to be caulked were "backed" which made the job of removing existing caulk much easier. When it turned out they were not, the contractor sought an equitable adjustment for the increased work. The board denied the claim finding "the clause is obviously to be construed as a general performance instruction first to bidders, then to the Contractor, not a representation as to a site condition."[21] An additional example of a contractual requirement is a delivery date. In American Shipbuilding Co. v. United States, [22] for example, the Court of Claims held that a contract clause in a shipbuilding contract requiring delivery of a ship within 900

days was a contract due date and not a representation that the ship could be built by the contractor within that period of time. The court arrived at its conclusion through the process of contract interpretation and this aspect of the opinion will be considered below in connection with the techniques used to determine whether a representation exists. The significance of the case for present purposes is that once the court determined the provision was a due date it found it was not an actionable representation.

In these cases, then, the alleged assertion set forth by the contractor as the basis for his recovery did not convey a fact pertinent to contract performance. Instead, it expressed a goal toward which the contractor was legally obligated to work and, if successfully achieved, perhaps would represent a fact at that point but did not at the time the government conveyed the requirement to the contractor. Therefore, at the time the assertion was made in these cases it did not constitute an actionable representation for misrepresentation purposes because it did not reflect a fact in being.[23]

An actionable representation also cannot be created by a statement of opinion.[24] An opinion is one's viewpoint on a matter as opposed to an assertion with certainty of what he knows exists.[25]

The following two cases illustrate the proposition that an actionable representation may not be created by statements of opinion. In Loesch v. United States, [26] the government

had obtained flowage easements as part of its dam construction project to improve navigation on the Ohio river. The plaintiffs, who were owners of riparian property, alleged the government induced them to enter into the easement agreements by representing the dams would assist in controlling erosion along the river banks. The Court of Claims denied relief on the theory of misrepresentation finding the statements "manifested at best expressions of opinion or expectation given in circumstances which must have clearly identified them as such, rather than flat representations of fact."[27] Another example of an assertion of opinion which did not give rise to an actionable representation is the Armed Services Board's decision in Fleischman, KG. [28] The contract in this case was for laundromat service at an overseas military installation. The contract contemplated the contractor was to build the laundromat facilities and then immediately convey title to them since they were to be constructed on a military installation. The contract was for a five-year term and the contractor before award expressed concern to the contracting officer that this period was insufficient to recoup the capital costs in the buildings plus reasonable profit if the buildings had to be conveyed. The contracting officer stated that if the contractor performed the required services satisfactorily this and his financial situation would be considered at the time of contract renewal. The contracting officer, however, insisted on a five-year contract with the conveyance clause and the contract was awarded on this basis. When the contractor did

not receive the follow-on contract, he claimed for his unrecovered costs asserting that the contracting officer had misrepresented he would receive the follow-on contract. The board concluded the contracting officer's statements under the circumstances were expressions of opinion and not assertions of fact and, therefore, were not actionable. Significant to the board's conclusion was that the statements of the contracting officer, when taken in context, merely showed a guess as to the possible course of future events and not a misrepresentation of what would in fact occur. This was demonstrated by the contracting officer's insistence on a five-year contract term with a conveyance clause which was inconsistent with any guarantee the contractor would automatically receive the follow-on contract.

These two cases on assertions of opinion versus fact, as well as the opinion cases cited in the margin, reveal that in judging whether a representation is an assertion of an opinion or fact the courts and boards will examine the exact words used as well as the context in which they were used. The determination being made is whether the assertion reflects reality as the government knows it at the time of the representation or merely represents speculation on what exists or may exist. If it is speculative in nature, it is not an actionable assertion under misrepresentation theory.

b. The Addressee of the Assertion

Moreover, not only must the assertion communicate factual matter to constitute an actionable representation but

it also must be addressed to the contractor claiming to be misled or be made with some knowledge or expectation that it would come to his attention.

There is only one case on this subject in government contracts which has been discovered. The plaintiff in Aerojet-General Corp. v. United States [29] had acquired another company that was engaged in fulfilling a government ship construction contract. Prior to the acquisition, the plaintiff conducted an intensive investigation to determine whether the contract was on time and budget. The investigation revealed a progress payment report certified by government inspectors in the files of the target company which indicated the contract was progressing satisfactorily. The acquisition took place, the report was inaccurate and the plaintiff brought an action for misrepresentation because the acquired company was losing badly on the contract. The Court of Claims found no actionable representation and observed, "defendant would not be liable to Aerojet because the information was not prepared for the latter's benefit, with intent to influence it, or with knowledge or expectation that Gibbs would hand it over to Aerojet."[30]

It can be gleaned from this case that a representation which is not made to the complaining contractor, if there was no knowledge or expectation he would receive it, is not actionable. Moreover, even if a representation is not directed at the complaining contractor, it may be actionable if made with the knowledge or expectation the contractor would receive

it. This latter aspect of the rule is sensible since under these circumstances the government as maker of the representation would be in a poor position to deny the representation was intended at least in part for the complaining contractor.

c. Materiality

Finally, the representation to be actionable must be "material."[31] The discussion of what constitutes materiality in the misrepesentation cases is less than satisfactory because no single case comprehensively and clearly examines the concept of materiality. However, the two cases below illustrate with a relative degree of accuracy the meaning of materiality.

Hyland Electrical Supply Co. [32] serves as one example of the materiality requirement. The contractor originally agreed to supply electrical clips to the government at its call and had placed a standing order with its supplier to meet these requirements. The contractor agreed to a subsequent modification of its contract with the government to decrease delivery time and increase the maximum number of clips subject to call when a government buyer represented that the contractor's supplier was holding 70,900 clips against the contract to meet possible calls. Once the modification was finalized, the government issued a first call for all the clips the contractor's supplier was holding. Shortly thereafter, and before the delivery of the first call, the contractor agreed to a second call of 18,000 clips without checking with its supplier concerning availability. When the supplier could not

meet either call, the government terminated the contract for default. On the appeal of the default termination, the contractor alleged its agreement to the modification was induced by a misrepresentation of the government buyer as to the number of clips being held by the supplier. The Armed Services Board concluded, however, that the contractor had "not established the buyer's statement was material"[33] as evidenced by the fact the contractor agreed to a second call without checking with its supplier after the first call had exhausted the entire amount of clips the buyer said was being held by the supplier. In short, the existence of the clips with the supplier was not considered significant by the contractor and had no substantial affect on his agreement to the contract modification.

The board could have easily analyzed this case solely in causation terms; i.e., that the buyer's representation did not cause the contractor to rely. Instead, it chose to view the contractor's lack of reliance as evidence the representation was not material.

Another materiality case is the Court of Claims decision in Tree Preservation Co. v. United States. [34] This contract was for the cleanup of flood damage along a river. The contractor alleged it was misled into underestimating the work to be done by an inaccurate government representation of the lengths of the river sections to be cleared. The Court of Claims found that representations concerning the lengths to be cleared had been made but further observed that the lengths of

the sections "were not a necessary element in determining the amount of work to be done"[35] because the flood damage was not distributed evenly through the sections but instead some areas contained considerable work and others none. The contractor's misrepresentation claim, therefore, was denied for this reason, and other reasons not pertinent to the current discussion.

Although the court in Tree Preservation did not consider the lengths of the river sections to be cleared germane, the lengths obviously had some utility in an estimate of the work. The thrust of the court's opinion, then, was really that the lengths were only marginally useful to a calculation of the work and not sufficiently so to be actionable. The court found, in other words, that even though the plaintiff may have alleged he relied on the lengths in estimating the work the lengths would not have been significant to the reasonable contractor when developing his estimate of the work.

These two cases illustrate that for a representation to be material it must have a substantial effect on how the reasonable contractor would anticipate what was involved in performing the contract such that had the contractor known the true facts he would not have agreed to the bargain that was struck. Put in other words, a matter is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question."[36] This can be seen, for example, in Hyland Electrical Supply Co. where the buyer's

representation as to the amount of clips held by the supplier had no effect on the contractor's assent to the contract modification and, therefore, was not deemed material.

Moreover, Hyland further illustrates another aspect of materiality which is its close relationship with causation. A representation which is material will normally cause reliance; a representation which is not material, on the other hand, will not normally cause reliance. For example, in Hyland the board took the fact that the representation did not cause reliance as evidence the representaton was not material. It has even been stated by one authority that if a representation is material it will raise a presumption, in the absence of evidence to the contrary, that it caused reliance and, conversely, if it is not material, this will raise a presumption, in the absence of evidence to the contrary, that it did not cause reliance.[37]

However, materiality is a concept that is distinct from causation and can prevent a representation that otherwise induces reliance from being actionable. This is because to be material the representation must be such that it would cause a reasonable contractor to rely, not that it caused the specific contractor in the case under consideration to rely. In the words of one leading commentator, "[w]here the fact represented would not influence the reasonable man, either because of its triviality, or because of its irrelevance to the subject dealt with, the law will ordinarily regard that fact as immaterial and reliance on it unjustified."[38] This can be seen in the Tree Preservation case above where the court was unwilling to

place more emphasis on the represented lengths of the river than it thought reasonable under the circumstances even though the contractor may have done differently. Materiality, then, is a threshold below which a representation that causes reliance will nevertheless not be actionable.

d. A Rationale for the Actionability Requirements

A representation to be actionable, therefore, must be an assertion of fact, addressed to the person alleging he was misled or at least made with the knowledge or expectation that it would come to that person's attention, and must be material. The cases addressing these requirements do not attempt to explain why they are necessary elements of the actionable representation. A two-fold rationale may be posited, however.

First, the capacity of a non-fact, an assertion intended for another or an immaterial fact to mislead a prospective contractor into a bargain he would have otherwise not agreed to is minimal. This seems particularly true for an assertion which is immaterial or one that amounts to a contractual requirement; it is also true for an opinion which by its nature is merely another's view of a matter as opposed to a reflection of fact. An assertion of fact intended for another may have a greater potential to mislead than an immaterial assertion, contractual requirement or an opinion but even its potential to mislead is diluted somewhat when it is received by someone cognizant that the representation was not intended to induce his reliance. These three aspects of the actionable representation, therefore, are related to the

reliance elements which are discussed below and which must be established by the contractor to be entitled to relief. Moreover, misrepresentation may be viewed as a factor which impinges upon the mutuality of assent which is a sine qua non of contract law. True mutuality of assent is not impaired where the representation is unlikely to mislead.

Second, to the extent a non-fact, an immaterial assertion or an assertion intended for another can and do induce reliance, the administrative burden on the government would be greatly, and probably impossibly, enhanced if it were responsible for every assertion it made irrespective of the nature of the assertion, into whose hands it fell or its relevance to anticipated contract performance. The government, even with the greatest care, would oftentimes be unable to control the effects of its assertions unless some limits were recognized. This would seem to be of the greatest concern with an assertion of fact which was received by someone it was not intended for; once the assertion is out of the government's control it has no way of effectively restricting access as was illustrated by Aerojet-General v. United States, above. Additionally, if the government must prepare with the same care as statements of fact every assertion of opinion or immaterial assertion this too would consume large, undue amounts of resources.

Earlier it was said the doctrine of affirmative misrepresentation reallocates the risk of unanticipated contractual difficulties when good faith and fair dealing

require it. The doctrine is rooted in the concept of fairness and it can only be expected to operate when the reallocation of the risk is fair to both parties. The requirements of an actionable representation constitute a legal policy decision to restrict the operation of the reallocation of the risk to situations where there is the greatest likelihood for harm on one hand and where there is the most governmental control on the other and, therefore, where the risk is most fairly allocated to the government.

It is worth observing that the actionablility of a representation is not frequently litigated. This is probably explained by the fact that prosecuting a case before an administrative board or court, or both, is sufficiently expensive that the litigaton process exercises a considerable amount of pressure to select out those claims clearly without merit.

2. The Timing and Manner of the Representation

Having set forth the salient aspects of an actionable representation, the next topic appropriate for consideration is the rules governing when and how during the contractual process an actionable representation can be made. In short, an actionable representation may be made at any time in any manner.

When the government chooses to make a representation, it most frequently does so prior to award during the contract formation process.[39] These representations are generally contained in the written materials which constitute the government's solicitation. For example, the cases reflect that representations have been made in the drawings, specifications, plans, maps or logs as well as in the other paperwork that constitutes the solicitation.[40] The representation can also occur apart from the solicitation package, however. For example, instances exist where a representation has been made prior to award at a bidders' conference,[41] negotiation session,[42] in a conversation with government personnel[43] and through a letter or a telegram.[44]

Although the representation normally occurs before award, it may also occur after award. At this point, since contract formation and especially contract price are final, the capacity for a representation to induce detrimental reliance is limited. However, a representation which does come after award and induces detrimental reliance can result in contractor recovery. In A Rand Corporation, [45] for example, the

contractor was entitled to additional compensation for corrections that were required because of the missiting of a building. Correct siting of the building was the contractor's responsibility, but during a post-award site visit government representatives pointed out existing stakes, informed the contractor the survey was complete and authorized construction according to that layout. This information turned out to be incorrect, however, since the staking represented only the preliminary site survey and not the final siting of the building. Therefore, this case illustrates that a government representation after award which increases the contractor's costs can serve as the basis for a misrepresentation claim.

This discussion has already shown that the representation may be written or oral. The representation may also be made through words or by conduct. A representation by conduct is relatively rare but a good example is L.W. Foster v. United States. [46] The plaintiff bid on a contract to make Navy flying jackets. The contract specifications were defective and the plaintiff knew this at the time of its bid; however, the plaintiff had performed several other contracts for the manufacture of the same jacket and, during the performance of each contract, specification deviations were permitted to overcome the deficiencies. The plaintiff assumed the prior course of conduct would pertain to the current contract and bid accordingly. The current contract was administered by a different government agency than the others, which resulted in reluctance to grant the specification

deviations and, thereby, increased the costs of manufacture to the plaintiff. The Court of Claims recognized the government was bound by the prior course of dealing and found the plaintiff reasonably assumed in accepting the contract that it would be granted the same deviations by the new agency as by the old. Therefore, in this case, an implied representation that the same specification deviations would be granted stemming from a course of conduct resulted in an equitable adjustment to cover the increased costs due to the defective specifications.

A representation to be actionable does not need to be made by the contracting officer personally but can be made by anyone who is officially connected with the contract.[47] Since most representations are made in the solicitation documentation which is issued under the authority of the contracting officer, these representations can be viewed as being those of the contracting officer. However, in most cases where a representation is made apart from the solicitation documents such as at a bidders' conference or a negotiation session, the representation usually is not made directly by the contracting officer but by one of his representatives. In each of these cases, however, the representative appeared to be acting officially and within the scope of his authority.[48] Therefore, an actionable representation may be conveyed by either the contracting officer or someone properly exercising authority under his auspices.

3. Determining the Existence and Meaning of the Alleged

Representational Language

The first two subsections have been devoted to establishing the definitional elements of an actionable representation and when and how an actionable representation can be made. The focus of this section is to examine some of the rules employed by the courts and boards when the parties disagree between themselves as to what language, if any, was conveyed or whether, once it is determined what language was conveyed, it meets the definitional elements of the actionable representation.

a. Determining the Existence of the Alleged Representational Language

The first area of disagreement between the parties can arise over whether the government used and conveyed the language the contractor alleges it did. The nature of the dispute is usually that the contractor alleges that the representational language consists of certain words which were communicated to him by the government and the government either alleges the words were never used or that more was communicated than that which the contractor alleges.

A dispute over whether certain words were used and conveyed with the government denying their use does not occur when the alleged representational language is employed in the solicitation or contract documents for the obvious reason the documents themselves establish incontrovertibly the words actually employed. The question that does arise in this context sometimes, however, is a dispute over whether the

language in the documents is the limit of the alleged representational language or whether other language extraneous to the documents must be considered.

This question surfaces in cases where the government chooses to represent part of what it desires to reveal by express assertion in the solicitation and contract documents and incorporates the remainder of what it desires to reveal through reference. The danger from the contractor's standpoint is that if he is not alert to the government's reference to other data he may be misled because that which is expressly related will only be the partial story. Nevertheless, the rule seems to be firmly established that the scope of the government's representation will be judged not only by express statements in the documents but also by clear references to related information.

The lead case for this proposition is Flippin Materials Co. v. United States. [49] The contractor agreed to provide crushed rock aggregate from a government quarry. The contractor's bid was based on profiles of borings provided by the government which showed subterranean cavities; what the government did not provide the contractor were field logs of the borings which showed the cavities contained considerable amounts of clay which made the process of producing aggregate more expensive. The contract documents, however, referenced the availability of the "results of all borings and tests" for contractor examination. The Court of Claims interpreted this language, particularly in light of other contract language and

prior dealings of the parties, to have clearly referred the contractor to the field logs. The Court concluded "a bidder can[not] rely on some portion of the information supplied by the Government without looking at other Government materials (to which he is directed by the contract documents themselves) which qualify, expand, or explain the particular segment of information on which the contractor intends to rely."[50]

Unlike alleged representations occurring in solicitation or contract documents, when the alleged representational language is purportedly made orally at conferences, negotiations or the like, disputes sometimes arise as to whether the language alleged by the contractor was actually said by the government. The question of what language, if any, was represented to the contractor will be a factual question and evidence will be taken and findings made.[51] An example is the Armed Services Board's opinion in Lear Siegler, Inc. [52] The contract in this case was for a telemetry system at a military installation. The contractor alleged that at a negotiation conference government representatives stated a certain brand name computer was available to be used as part of the system. The government denied this statement was made. The significance of the statement was that the computer was not available which caused the contractor performance problems. The board took evidence on the question and made findings that the government representatives had stated the named system was available.

b. The Meaning of the Alleged Representational Language

Once a determination of what language was used and conveyed to the contractor has been made, the next question is whether the language used constitutes an actionable representation employing the criteria discussed in the first section. Many times the contractor and the government will dispute the meaning to be given the words with the contractor asserting a representation has been made and the government alleging no representation was conveyed. The dispute usually centers around the requirement of the actionable repesentation that an assertion of fact as opposed to some other matter be made. The government will oftentimes in these cases defend by saying the alleged representation was an opinion, contractual requirement or a representation of factual matter different than that alleged by the contractor.

In resolving these disputes, the courts and boards have examined the language of the alleged assertion itself, other contract language and the surrounding circumstances to determine whether a representation was made. The stated goal in theory is to determine the intent of the parties at the time of contracting; in practice, however, the parties may have had no ascertainable intent, or their intent may have been at variance. The process, therefore, sometimes becomes an effort to provide the most reasonable and equitable solution in light of the contract language and all the other factors.

All these aspects will be examined in the discussion which follows.

(1). The Use of Contract Language

Frequently, the language of the alleged assertion is sufficiently unambiguous on its face to conclude that a representation has or has not been made.[53] For example, in the W.G. Thompson, Inc. case discussed above, the board's examination of the words contained in the workmanship specification convinced it that no representation had been made that the caulking to be replaced was backed.

On other occasions, particularly if the language of the alleged representation is not sufficiently clear on its face, reference will be made to remaining contract provisions to determine the meaning to be given the alleged representational language.[54] In another recent case, for example,[55] the contractor alleged the words "EXST. GROUND" on a contract profile drawing meant the excavation required would occur in loose soil and not rock. The board determined from examining the words and the drawing it was apparent the notation referred to existing ground levels for grading purposes. The board, then, further observed that the contractor's interpretation was in direct conflict with other provisions of the contract which clearly contemplated that rock might be encountered during excavation. Therefore, it concluded that all the contract provisons taken together clearly showed no representation of excavation conditions had been made. An effort will be made, as demonstrated by this case, when more than one contract provision is considered to give meaning and effect to all the provisions by attempting to find one, sensible common construction.[56] This is the preferred rule of contract

interpretation which attempts to give meaning to all parts of a document.

One of the most troubling spots regarding interpretation of alleged representational language in light of other contract language is in the area of disclaimers. The government almost always attempts to offset representational language with other language that says in effect "we don't really mean what we say." Disclaimer language can be involved in disputes betweeen the parties in one of two ways. First, the absence or presence of such language can be employed by the courts and boards in determining whether alleged representational language was intended to be a representation or not. Examples of the use of disclaimer language in this manner will be considered in the discussion of the Everett Plywood and Door Corporation and Caffall Brothers Forest Products, Inc. cases later in this section. Second, the government may assert disclaimer language negates the effect of language which clearly and unequivocally on its face and in the context of the other language and circumstances conveys a representation. Here the question is not whether the alleged representational language conveys a representation but whether the contractor may rely on it in light of the disclaimer. The nettlesome problem then becomes which language--representational or disclaimer--is given effect. A discussion of this disclaimer problem is deferred until the section on reasonable reliance where it most logically fits. The general rule, however, is that disclaimer language will not

overcome representational language unless the disclaimer language is absolutely and unambiguously clear.

In cases concerning estimates, the government will many times argue that since the figure given was denominated with the prefix "estimate" or "approximate" it is in the nature of an opinion and no representation was intended.[57] The contractor will assert otherwise. To resolve this dispute, the courts and boards employ a practical rule of construction. The use of the words "estimate" or "approximate" is generally persuasive evidence the government did not intend to convey an exact representation as to the matter asserted which is usually in the nature of a quantity. The courts and boards feel, however, the government must intend for bidders to rely on the estimate given in some way; if the government did not, so the reasoning goes, it could simply have left the estimate out.[58] As one recent Court of Claims opinion said:

> We also find difficult to accept in itself the view that quantity estimates which are incorporated in a contract are totally meaningless. That contravenes the established cannon of construction that, preferably, contracts are to be construed in a way so as to give meaning to all their provisions.[59]

The existence of the estimate, then, in the solicitation or contract documents is evidence of the parties' intent and that they viewed the language to have some utility at the time of contract formation. The result is that although the courts and boards will not view the estimated quantity itself to be an exact representation and, therefore actionable, they will find

other implied representations concerning the estimated quantities that are actionable.

This reasoning and the types of implied representations which are found will be examined at more length below in the section on forms of representations in connection with implied representations arising from estimates. It is mentioned at this point because it illustrates one other instance where the courts and boards will use contract language to determine whether an actionable representation has been made. In this instance, though, the focus is not so much on the language itself as it is on the fact that the provision exists in the contract and must be given some effect if possible.

(2). The Use of Surrounding Circumstances

To resolve a dispute between the parties as to whether language was intended to be a representation, reference will also be made to the circumstances surrounding contract formation in addition to the contract language. Reference to external circumstances may be used when the resolution of whether language amounts to a representation cannot be determined from an examination of the language in question or other provisions, or it may also be used to bolster a tentative conclusion arrived at from interpretation of the contractual provisions as the discussion below will show.[60]

One of the surrounding circumstances which is influential in determining whether a representation has been conveyed is the relative position of the parties to know the information which serves as a basis for the alleged

representation.[61] A recent case illustrating this proposition is the Court of Claims decision in American Shipbuilding Co. v. United States, discussed above. The contractor had accepted a shipbuilding contract which required construction to be completed within 900 days. Actual construction time took considerably longer and the contractor brought suit for damages claiming the contract provision requiring delivery within 900 days was a representation that construction was possible within that time. The Court of Claims found that the time necessary to perform a contract is a function of both the contract specifications and the contractor's capabilities. Since the government could know only the former and not the latter, while the contractor was the best judge of his own capabilities, the Court concluded the 900 day requirement was intended to be a mere due date and not a representation the contractor could perform the work within that period of time.

On the other hand, it has been held that where the information necessary to an informed, competitive bid is available to the government but not to the contractor a communication of that information in the bidding materials is persuasive evidence it was intended to be a representation.[62] For example, in Baifield Industries, Inc., [63] the government offered bidders government equipment that had been in storage for ten years to be used to manufacture the cartridges which were the subject of the contract. Since the equipment was not stored in such a manner that bidders could operate it, the

government provided information concerning the condition of the equipment. When some of the equipment was not operable as stated the contractor claimed for his costs of having to service it. The Armed Services Board concluded that the contractor was entitled to recover since the statements concerning the condition of the equipment were intended to be representations as evidenced by the fact the bidders had no other way of determining the equipment's operability and knowledge of operability was critical to the preparation of a competitive bid.

The rationale behind this line of cases is that the parties likely intend language to be a representation when the government is in a superior position to know the matters represented, but such an understanding does not exist when the contractor is in a better, or at least as good, a position to know the same facts. Clearly, if the government is in the superior position the natural assumption is that it knows what it is speaking of when it communicates information and intends the information to be relied on since the contractor is not in a position to confirm the information which is required for an intelligent bid; when the government is not in a better position these assumptions do not prevail and the contractor is warned by the circumstances of the likelihood that no representation is being conveyed.

In utilizing the surrounding circumstances as an aid to interpretation, the courts and boards have also viewed solicitaton or contract language in light of associated factual

information that is revealed by the government and made available to the contractor. For example, in L.M. Jones Co. v. United States, [64] the contractor was to build a bridge upstream from a government dam project but construction of the bridge was delayed when the concurrence of the retarding effect of the partially completed dam and unusually heavy rainfall caused the contractor's worksite to flood. The contractor sued claiming the contract language that "the conduit capacity [of the dam] is sufficient to pass the flow...except during flood period when water will be temporarily impounded in the reservoir" represented that the worksite would at most be flooded only for short periods of time and not the five months which actually occurred. The Court of Claims noted the contract documents informed the contractor that the dam was sufficiently complete that it is was retarding the flow of water during wet periods and the documents referred the contractor to available hydrographic data, not attached to the solicitation or contract documents, which warned of possible seasonal flooding. These two pieces of information when considered together made it clear in the court's view that the reference in the contract documents to "temporary" flooding meant only that the flooding would be non-permanent and was not intended to be a representation that flooding would only be for brief periods. Therefore, the associated information contained in the hydrographic reports which was not attached to the solicitation or contract documents but which was brought to the contractor's attention by reference was critical in giving an

interpretive gloss to the meaning of the alleged representational language.

The acts of the parties will also be examined to determine whether the language employed conveys a representation. This is a particularly persuasive use of surrounding circumstances to determine the parties' intent since they can be expected to behave consistent with their understanding of the contract provisions. Everett Plywood and Door Corporation v. the United States serves as a good example of this point.[65] This contract, which was for the sale of timber, stated that specific quantities were recoverable from the cut area. When the timber recovered did not meet the amounts stated, the contractor brought suit. The question before the Court of Claims was whether the stated quantities were exact representations of recoverable quantities or merely estimates. In holding they amounted to exact representations, the court considered among other factors that the regional office of the Forest Service that drew up the contract rejected the advice of its head office to include provisions in the contract disclaiming any representations and for accelerated amortization of road costs for roads the contractor was obligated to build as part of the contract.[66] The action by the government in omitting these provisions evinced a belief that the total amount of timber stated in the contract would be recovered. This factor was heavily considered by the court in arriving at its conclusion that the government intended to represent an exact amount and not an estimate.

Also relied on in the court's opinion in reaching its conclusion were the facts that the amount of timber to be recovered was stated in the contract language in clear terms and that it was impossible due to the rugged terrain for the bidders to assess the recovery for themselves prior to bid. This case also illustrates, then, some of the other factors of dispute resolution already discussed (examination of the alleged representational language and the relative access of the parties to the information represented) and how a number of the factors may be employed simulataneously in resolving a dispute between the parties as to the existence of a representation.

This case contains an irony in the court's reliance on the omission of the government's use of a disclaimer clause. It will be seen in the reasonable reliance section that disclaimer clauses are not favored and they are often ignored by the courts with some tart words to the government for their attempted use. It seems, then, if the government employs a disclaimer clause the clause will often be ignored and the government reprimanded and if it does not employ a clause the omission may be used by the courts and boards adversely to the government in a determination of whether contract language conveys a representation.

A contractor's own experience and that of his industry is another external circumstance that will be examined in determining whether a representation was intended.[67] A good case illustrating this, which also demonstrates some of the

other techniques already discussed, is the recent Court of Claims decision in Caffall Brothers Forest Products v. United States. [68] This contract was for the sale of government timber. The sale advertisement, prospectus and the contract documents all contained figures for the available timber. These figures were clearly labelled "estimates" and the documents contained associated language which again reiterated the figures were estimates and were not intended to be guarantees. The estimates were developed from a "cruise" which is a statistical technique where one part of the cut area is examined and the results then extrapolated to the entire area. The industry practice and the experience of the contractor revealed that cruising was generally not very accurate. In fact, the industry had at one point attempted to have the Forest Service agree to guarantee the results of its cruises which it refused to do because of the known inaccuracies of cruising. The contractor had made its own extensive cruise of the cut area and determined the Forest Service estimate was accurate. When the actual cut from the area proved to be considerably less than the estimates, the contractor brought suit claiming the figures given were precise representations of the recoverable timber. The court disagreed for several reasons. It directed its attention first to the language of the advertisement, prospectus and contract which clearly evinced no intent to convey a representation of an exact amount of recoverable timber. This conclusion was reenforced by the industry and contractor experience that the cruise technique

was inaccurate which made any belief that a representation of exact quantity was intended unreasonable. Additionally, the court also observed that this was not a case where the government had exclusive access to the information which served as a basis for the estimates as evidenced by the contractor's own cruise and, therefore, the case for a representation was further diluted.

In some respects, this case is much like the Everett Plywood and Door Corporaton case just discussed above. The court in this case used the presence of disclaimers--the prefix "estimate" with the given quantities, the associated language (which indicated the quantities were only estimates in a narrative fashion) and the "no guarantee" language--in resolving the dispute between the parties as to whether a representation of recoverable amounts was intended in the same way that the absence of disclaimer language was considered important in Everett Plywood and Door Corporation. Moreover, this case also illustrates how more than one of the factors of dispute resolution already discussed may be combined to reach a conclusion. Here, the associated contractual language (the disclaimers), the relative access of the parties to the information and the industry and contractor experience were all relied on in determining the quantity conveyed was not an exact representation of the recoverable timber.

Finally, prior dealings between the parties which demonstrate clearly that language in a solicitation was not meant to be a representation has been used in resolving whether

a representation was conveyed. The contract in Microcord Corporation v. United States [69] provided for the microfilming of obsolete engineering documents. The documents existed in five sizes with the largest size being considerably more expensive to microfilm than the others. Although the government knew approximately how many total documents it had, it had only the roughest idea of how many documents were in each size. This was fully explained to all potential bidders, including the plaintiff, at a bidders' conference prior to issuance of a solicitation. When the solicitation was issued, however, the government mistakenly gave exact percentages for each size. The plaintiff claimed the percentages constituted a representation such that it was entitled to additional compensation for having to do more microfilming of the largest size documents than was listed in the solicitation. The Court of Claims refused to divorce the figures in the solicitation from the relevant factual background and held that the figures were intended only to be estimates and not exact representations of the work required, as the contractor well knew from its attendance at the conference.

In summary, then, when there is a dispute between the parties as to the meaning of the language used and whether it conveys an actionable representation, the courts and boards will use several techniques to resolve the issue and arrive at the parties' presumed intent at the time of contracting. The techniques used to resolve the dispute include examination of the alleged representational language as well as other

contextual contract language. Resort also may be made to the surrounding circumstances including the relative access of the parties to the information conveyed, associated factual information made available to the contractor by the governnment, acts of the parties, the contractor and industry experience and the prior dealings between the parties. Oftentimes, more than one technique will be employed in the same case to resolve the dispute.

4. The Forms of the Representation

Having examined the definitional requirements of an actionable representation, when and how it is made and the techniques used by the courts and boards to determine its existence, the focus of this section is to examine the forms of the actionable representation. A representation will occur in one of two forms: express or implied.

a. Express Representations

An express representation is made when the assertion is set forth in the words which comprise the communication to the contractor with no necessity to examine implications. Examples of express representations include the buyer's statement of the amount of clips being held by the contractor's supplier in the Hyland Electrical Supply Co. case and the government's statement of the amount of recoverable timber in the Everett Plywood and Door Corporation case both of which were discussed earlier. Express representations arise in myriad factual contexts and generally relate to either the amount of work to be done, the conditions at the work site or other general matters affecting contract performance.[70] Because of the nature of express representations, they are normally easily recognized and require no extended discussion.

b. Implied Representations

An implied representation arises not from the "four corners" of the words which constitute the assertion as does an express representation. Rather, an implied representation is created from the implications contained in the words used by

the government and conveyed to the contractor or from conduct of the government. Sometimes the words or conduct of the government are sufficient alone to give rise to an implied representation; on other occasions, the implied representation does not arise unless the words or conduct are coupled with other facts known to the parties or considered against the background of the expectations of the parties to government contracts. These facets of the implied representation will be considered in the following discussion.

Many times the government will employ language, most often in the solicitation or contract, that is sufficient by itself to imply the existence of a fact. Instances of this occur in factually varied situations and depend on the language that is employed. In one case, for example, a specification that required a special lighting fixture to be substantially the same as items that had been in commercial use for not less than a year and for which replacement parts could be obtained impliedly represented that such a lighting fixture was commercially available.[71] Likewise, in another case the contractor was to build a jet engine test facility at a naval air station. His work was hindered by an adjacent test facility which when operated produced such high noise levels that work was virtually impossible at the construction site. The board found that an incorporation into the contract by reference of a Corps of Engineers safety manual that provided for among other things procedures for the muffling of noise generated by the government impliedly represented that the work

site would not be flooded with excessive government caused noise.[72] Other cases where the words used implied the existence of a fact are given in the margin.[73]

The words employed by the government may take on additional significance when added to facts known to both parties. In another case, for example,[74] the government specification described the item to be supplied by manufacturer and catalog number or a "substantial equal." The designated item had previously been developed pursuant to a government research and development project and this was known to the contractor. The court found that the circumstances of the item's development combined with the use of a "brand name or equal" specification impliedly represented the brand name item was commercially available from the specified manufacturer or the government possessed plans from which the contractor could fabricate it. The court reasoned that since the item had been developed pursuant to a government research and development contract, the contractor could reasonably assume the government knew the item was available from the designated manufacturer and this is why it specified a brand name, or had the plans to test the efficacy of a substitute and this is why it specified a substantial equal. Therefore, when it turned out the item was not commercially available from the specified manufacturer nor did the government possess plans for its manufacture, the contractor was entitled to its increased costs due to obtaining the item from an alternate source.

The words used by the government may create an implied

representation not only when they are considered in the context of the facts known to both parties but also when they are examined in the context of the expectations of the parties to government contracting. The area which best exemplifies this is when the government includes an estimate in the solicitation and contract documents. Estimates are frequently used in requirements contracts or in contracts for the sale of government property such as timber contracts. In the former the estimate gives an approximation of the amount of work required, whereas in the latter it gives an approximation of the property to be sold.

The lead case on estimates is Womack v. United States. [75] The contract in this case required the making of title and usage plats for federal lands in Utah. The government estimated that there would be 65,000 title documents to be included in the plats and that 85% of the plats would be standard form. In fact, there were over 100,000 documents of which only 55% could be placed on standard form plats thus driving up the contractor's performance costs. The facts further established that although the estimates as to both the documents and the plats were originally arrived at with due care, by the time of the award the government had access to information which revealed the figure as to the documents was erroneous. The government did not examine this information, however, and therefore did not apprise the plaintiff of the inaccuracy of the document estimate. Under these circumstances, the Court of Claims found an actionable

misrepresentation as to the document estimate, but not as to the standard plat estimate, stating a bidder "is entitled to rely on government estimates as representing honest and informed conclusions."[76] The court concluded that because of this misrepresentation the contractor was entitled to recover his costs for the unanticipated work concerning the title documents.

Although the court did not expressly refer to an implied representation, it is apparent that the actionable misrepresentation it found was predicated on an implied representation that when estimates are placed in the solicitation documents they have been arrived at honestly and with due care. To put it in other words, although the court in Womack accepted the government's position that the use of an estimate did not constitute a actionable representation as to the exact figure represented, it did find that the use of the estimate by the government impliedly represented that certain minimum standards of care and honesty were employed in arriving at the estimates. Since the government obviously did not use due care in arriving at the document estimate as evidenced by the fact that if it had done so it would have been aware of the estimate's inaccuracy, it was guilty of misrepresentation.

It is appropriate to divert for a moment and muse about the genesis of the implied representation found by the court in Womack. This implied representation is seemingly created through the conjunction of the necessity of estimates to the bidding process in certain contracts and the government's

obligation to deal fairly and in good faith. Estimates are used where no exact figure exists as to the work to be done or the property to be sold, but some approximation is required so that bidders may intelligently bid and the government has some basis upon which to evaluate which bid is most advantageous to it. Estimates, then, may be essential in certain contracts to a sound bidding process. When this is so, it is the natural expectation of the parties who have been solicited to bid that the government in executing its duty of dealing fairly and in good faith will arrive at the estimates honestly and with appropriate care. This combination of the materiality of the estimates to intelligent contract formation and the government's ethical obligations create the implied representation found by the court in Womack. [77]

These same factors which gave rise to the implied representation of due care in Womack have resulted in the courts and boards finding other types of implied representations from the use of estimates. For example, it has been held that not only does the use of an estimate imply due care in its calculation, but also guarantees that the estimate is accurate within reasonable limitations.[78] Moreover, in Womack the court held that the use of an estimate represented that it was honestly made and other decisions have found such an implied representation when the government made consciously false estimates.[79] Also recently, as discussed below in connection with the Chemical Technology case, it has been held that the use of an estimate results in an implied

representation that all contingencies that might affect the validity of the estimate have been revealed to bidders; in effect, then, the use of an estimate impliedly represents there is no non-dislcosure of superior knowledge as to the subject matter to which the estimate relates.

The implied representations that come from the use of estimates relate to two topics already discussed. The first is materiality. Materiality was discussed in connection with the actionable representation and it was observed that to be actionable a representation needed to meet the test of materiality. The Womack decision reveals the concept of materiality can have a synergistic relationship with concept of representation. Not only must a representation be material to be actionable, but an asserted matter such as an estimate may be so material to the bidding process that its materiality serves as a factor in finding a representation. In this regard, it has been observed that the more important the estimate to the bidding process the higher the standard of care that must be used in arriving at the estimate.[80] The second topic previously discussed was the presence of an estimate in the bidding or contract documents and its relevancy to the settlement of disputes between the parties as to whether a representation was conveyed. It was noted that the courts and boards will normally presume that the government intended an estimate contained in these documents to be a representation of some kind; otherwise the government would have deleted it. The government has at times argued that as the figure used is

prefaced with the word "estimate," and is sometimes further disclaimed by other contract language, no representation of any kind was intended.[81] The courts and boards are reluctant to accept that the estimates have been included in the solicitation and contract documents for no purpose, particularly where they are material to the bidding process. Consequently, they strive to find a sensible reason for the presence of the estimates by the creation of implied representations in connection with the use of estimates of due care, honesty, reasonable accuracy and disclosure of contingencies. In effect, they accept the government's position that the estimates are not representations of precise amounts but do not accept the suggestion they are wholly meaningless. Instead, the practical necessity for estimates in certain contracts is given due recognition through the implied representations they carry.

An implied representation may be created not only by words, words and surrounding facts or words when coupled with the expectations attendant to the formation of government contracts, but also through the conduct of the government. L.W. Foster v. United States discussed earlier is a good example of this point. There an implied representation was created from the prior contractual dealings of the parties. Two other situations of implied representations being created by conduct occur when the government chooses to reveal only part of the relevant and associated information it possesses and when it chooses a manner of contracting.

In regard to the first situation, cases arise where the government represents part of the information it possesses while witholding other relevant and associated information without informing bidders of the existence of this other information. This has taken place with some frequency in construction contracts where the government has made borings to determine the subsurface conditions and then reported only partially the boring results.[82] However, this phenomena is not restricted to construction contracts as the following case shows.

Recently, in Chemical Technology, Inc. v. United States, [83] the effect of partial disclosure was examined in the context of a contract for mess services at a military dining facility. The contract was a requirements contract which set forth in the solicitation the estimated number of meals per month. The estimated meals did not include calculations for the number of reservists doing annual two-week training because of the uncertainty at the time of the solicitation's preparation whether any of these reservists would be required to do their training at the installation. The solicitation also did not attempt to inform prospective bidders in any fashion of the possibility two-week reservists might have to be fed if their training occurred at the installation. The solicitation did specifically reference and include the feeding of weekend reservists. Actual performance of the contract required meal service for several groups of two-week reservists.

The Court of Claims found the contractor was entitled to an equitable adjustment for the unexpected additional cost associated with feeding the two-week reservists under two theories. First, it extended the Womack implied representation to include an implied representation that in preparing the estimates the government had included, or at least revealed to bidders, all contingencies. Since the government did not reveal to bidders the possibility of having to feed two-week reservists or include this contingency in its estimates, it misrepresented the actual facts. Second, and most germane to the current discussion, the court determined that by including and making specific reference in the solicitation to the weekend reservists, without any mention of two-week reservists, the government impliedly represented that it had included calculations for all reservists which again misrepresented the actual facts:

> Additionally, by failing to disclose the possibility of 2-weeks' reservist training to the contractor, the Government not only failed to disclose all of the relevant facts to the contractor...but the government may have actually misled the contractor....By footnoting the Meal Hours and Estimated Number of Meals section of the IFB with an adjustment of meal hours for weekend reservists...the preparers may have impliedly represented that...the information on all reservist training (i.e., including 2-weeks' active duty for training) was available to and used by the preparers.[84]

The effect of revealing only a "half truth" as in Chemical Technology by mentioning the weekend but not the two-week reservists is to make an implied representation that

all relevant information has been revealed. This implied representation arises from the conduct of the government in revealing some relevant information without advising bidders other relevant information exists. The natural assumption of bidders in these circumstances is that the government has made full disclosure of all related information since it has undertaken to reveal some relevant information and has placed no qualification on its disclosure to the effect that it is only partial or, alternatively, attempted to make reference to where the remainder of the relevant informaton may be found as occurred in Flippin Materials Co. v. United States discussed above. This assumption is only reenforced by the government's obligation to deal fairly and in good faith with its bidders which means bidders do not expect and are not prepared for any government sleight-of-hand through revelations of only half-truths. In effect, then, this type of implied representation states that there is no non-disclosure of other relevant information.

An implied representation through conduct may also be created by the manner which the government chooses to conduct its contracting. The best example of this is the Armed Services Board's decision in Johnson Electronics, Inc. [85] The contract in this case was for the manufacture and supply of radio power units and modification kits. The contract was let on a small business set aside basis, was an advertised production-type contract and contained a short delivery time for the articles. The government did not reveal to the bidders

that the items called for were not within the current state of the art but, instead, would require extensive research and development prior to production. The contractor found performance of the contract was beyond its means and was subsequently default terminated. The board overturned the default termination finding that the manner in which the contract was let impliedly represented that it was a standard production contract which required no extraordinary research and development efforts:

> Viewed in the light of what the Invitation for Bids represented both affirmatively and tacitly, we think it fair to conclude that the parties assumed that the contract could be performed by a small business....It is significant that the time originally allowed for the design and manufacture of first articles was 90 days, which would not permit of an extended research and design period. Production and not design was the basic commodity called for by this contract. We can find no notice in this contract that it was intended to call for a major design effort, virtually if not actually a break-through in the existing state of the art. Especially does an advertised production contract form, set aside as it was, serve no such notice.
>
> ...[The Government's] advertising this procurement on a fixed-price, production contract, set-aside basis...misled the bidder into a task, the proportions of which it could not reasonably have anticipated.[86]

Under the circumstances, therefore, this implied representation misled the contractor into accepting a contract it was not capable of performing and the default was found to be for causes not within the control of the contractor as that term is used in the default clause.[87]

5. The Actionable Representation and the Creation of Warranties

One of the most difficult and least clearly explained facets of affirmative misrepresentation is its interface with contractor recovery under a theory of warranty. An often cited definition of a warranty[88] is that given by the Court of Claims in Dale Construction Co. v. United States:

> In essence a warranty is an assurance by one party to an agreement of the existence of a fact upon which the other party may rely; it is intended precisely to relieve the promisee of any duty to ascertain the facts for himself. Thus, a warranty amounts to a promise to indemnify the promisee for any loss if the fact warranted becomes untrue.[89]

Likewise, in Everett Plywood and Door Corporation v. United States, discussed above, the court adopted the formulation of warranties set forth in the Uniform Commercial Code, Section 2-313, which states that an express warranty is created by "[a]ny affirmation of fact...made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain...."[90]

The Dale Construction Co. holding that a warranty is created by "an assurance...of the existence of a fact" or the Everett Plywood and Door Corporation holding that a warranty is created by an "affirmation of fact" convey effectively the same thing--an assertion of fact will create a warranty.[91] As one leading treatise writer says, "[t]he representation of fact which induces a bargain is a warranty."[92] Both formulations in these cases also seem to recognize that the assertion must

be material, i.e., reasonably induce reliance ("existence of fact upon which the other party may rely" versus "becomes part of the bargain") and be directed at the party who relies ("assurance by one party...of the existence of a fact upon which the other party may rely" versus "by the seller to the buyer"). A representation of fact intended for the party who relies and which is material, therefore, will create a warranty; this same representation of fact, as was discussed above regarding the actionable representation, is also the nucleus for affirmative misrepresentation. Affirmative misrepresentation and warranty as theories intersect, then, at the representational element.

The relationship between affirmative misrepresentation and warranty as theories of recovery may be more fully explored through an examination of the contrasting opinions on similar facts of the Court of Claims in Gilbane Building Company v. United States [93] and Merritt-Chapman & Scott Corporation v. United States [94]. The contract in the former case was for the construction of a transit shed on government property which at the time of contract signing was under water. It was provided that another contractor was to dredge from the Atlantic Ocean and fill in the site. The dredging contractor was held-up in his work because of unforeseen weather problems which delayed Gilbane's access to the site for approximately six months. Gilbane sought delay damages alleging the contract specification providing "the site [will be] available to commence the work specified under this contract on November 22,

1954" amounted to a warranty the site would be available on that date. The court disagreed with this contention finding this representation did not amount to a "guarantee" the site would be available at the specified time. The court relied on other contract provisions which contemplated that there may be delays in the site availability and also on the nature of the fill work which was very susceptible to interference by inclement weather in concluding the parties did not intend for the specification language to be a guarantee of site availability. On the other hand, in Merritt-Chapman & Scott Corporation the court found a contract specification which provided that site availability "which will be about 1 December 1965" did amount to a guarantee. Here, the contract was for excavation as part of a river navigational project. Part of the excavation was in an area which was bisected by a state highway. The navigational project required that the government construct an alternate highway and, once this was completed, the excavation contractor could begin excavation at the site of the old highway. The project also required that the material excavated be deposited on nearby private land by a deadline which the private landowner had set. In short, the entire project was a phased arrangement with excavation required to be completed by a certain date because of the dumping deadline and excavation depending on the completion of the alternate highway and the consequent site availability. The highway contractor was delayed in constructing the alternate highway which delayed site access by the excavating contractor for nearly six months.

Under these circumstances, the court found that the words in the specification amounted to a guarantee or a warranty of site availability thereby entitling the excavation contractor to recovery for its delay costs. Of particular importance was the phased nature of the project which convinced the court that the parties must have intended the specification language to be a warranty.

These two cases provide two significant lessons regarding the relationship of affirmative misrepresentation and warranty as theories of contractor recovery. First, the essence of warranty is a guarantee that something is so or will be so at a certain point in the future. It has already been observed that a material representation of fact which serves as the basis for affirmative misrepresentation will also create a warranty. It follows, therefore, that this must be because the material representation of fact conveys a guarantee that the fact represented is so. In part 1a of this section, it was stated that the representation of fact which serves as the basis for an actionable representation is "a statement with certainty, without qualification, of the present existence of some matter." When a representation is made in such a manner, it impliedly carries a guarantee the fact represented is so; otherwise, the maker of the representation would be expected to qualify the representation in some manner. Secondly, the concept of warranty is broader than the concept of the actionable representation as used in misrepresentation. For example, the passage just quoted from part 1a also emphasizes

the actionable representation must relate to a matter already in existence. In other words, an actionable representation is not made when it relates to the existence of some future matter which is not already in existence at the time the representation is made. A warranty, however as Merrit-Chapman & Scott Corporation illustrates, may be created when a guarantee is made that a fact not presently in existence will be so at a specified future time. Therefore, although a representation of existing fact which serves as the nucleus for affirmative misrepresentation will also create a warranty, it is not the exclusive means by which a warranty may be created and a warranty may exist as to any matter which the government chooses to guarantee. Warranty as a theory of recovery, then, may lie in circumstances in which affirmative misrepresentation will not.

Affirmative misrepresentation and warranty also differ as theories in the requirement of culpability. The discussion below in the section on culpability will demonstrate that an affirmative misrepresentation is not actionable unless the representation is made with the intent to deceive, knowledge of its falsity or made with gross negligence, recklessness or without due care as to its accuracy. This requirement of culpability is not a necessary element of warranty. In Dale Construction Co., for example, the contract was for the replacement of a water main on a military installation. The contractor needed to work on one section of pipe and requested of the post engineer that the water be shut off; a

representative of the engineer's office in turn directed the city water department to shut off the supply of water to the pipe. The following day when the contractor was told by the engineer's office the water had been shut off he began to dig in the area of the pipe. In fact, the water had not been shut off and water gushing from the cracked pipe flooded the worksite. In finding the contractor was entitled to compensation for its loss upon a warranty theory, the court observed, "the record clearly establishes that the post engineer was not at fault in this incident." [95] Similarly, in Everett Plywood and Door Corporation, after finding a representation as to the amount of recoverable timber had been made and that it amounted to a warranty, the court stated:

> This analysis and conclusion reached are fully consistent with and supported by the rulings of this court that material representations in the government's plans and specifications, upon which the contractor justifiably relies, in the absence of a caveat regarding verification of the facts represented, amount to a warranty, and the contractor is entitled to recover damages caused by the incorrectness of such representations, irrespective of the good faith with which they were made. [96]

The appropriate question to address at this point is if both affirmative misrepresentation and warranty as theories of contractor recovery are available when a material representation of fact is made, what determines which theory will be used in deciding a case. The courts and boards have rarely addressed this question and a firm answer is not readily available from their decisions. In fact, the decisions most frequently confuse rather than aid analysis. For example, in

Morrison-Knudsen Co. v. United States the court found that the representation made was a warranty but then proceeded to use standard misrepresentation analysis including an examination of culpability.[97] In other cases, the plaintiffs brought their lawsuits on a misrepresentation theory but the court elected to decide the case on a warranty theory without explanation.[98] The confusion in selecting between affirmative misrepresentation and warranty theory when a material representation of fact is involved exists in jurisdictions other than government contracts. For example, one leading article observes in regard to this issue that "in some instances the decisions seem to defy attempts to bring consistency and clarification to this branch of the law"[99], and a well known treatise states "[t]hat the law of misrepresentation as laid down in a classic case [Derry v. Peek, 14 AC 337 (1889), requiring a fraudulent intent] is hopelessly inconsistent with the law governing misrepresentation when relied on as the basis of warranty or estoppel [which require no showing of culpability] can hardly be denied"[100].

In only one government contracts case, Aerojet General Corp. v. United States, discussed above, has a court attempted to provide some guidelines as to when misrepresentation or warranty theory might be applicable to decide a case. In addition to the report that the plaintiff found in the files of the target company, both oral and written representations were made by government officials to the plaintiff that the target

company was on time and budget. With respect to the allegations of misrepresentation, the court observed that two "lines of decisions hold the Government liable either as an absolute warrantor of its specifications and representations or, sometimes, for lack of appropriate due care toward the other contracting party."[101] In choosing which approach to select in this case, the court noted that the plaintiff did not occupy the same position as the plaintiffs in either line of decision since it had not been solicited by the government to do the contract work nor did the represented information "concern the scope of the contract work or the specifications or any obligation of the [government] under the contract with [the target company]."[102] The effect of this lack of "standing" was explained:

> In this situation, we think that defendant did not warrant or guarantee the information sought by and supplied to Aerojet; at the most, the Government would have to exercise reasonable due care, in the circumstances, toward plaintiff. To impose the higher requirement is to equate plaintiff with successful bidders who can in normal course rightfully and reasonably expect that the Government's authorized and positive representations as to work, conditions, or specifications should be accepted at face value and without further inquiry. Ordinarily both the procuring agency and the contractor (or about-to-be contractor) are intimatley interested in the accuracy of the warranted information which directly concerns the performance of the work.[103]

The court then proceeded to resolve the contractor's claims of false representations using the due care standard of misrepresentation, not warranty, theory.

The court's decision in Aerojet General clearly

establishes that warranty theory will not be used when the representation is made to an unsolicited contractor and does not relate to the contract work; in these circumstances, misrepresentation theory is the available remedy. The language quoted above from Aerojet General also strongly indicates the court's preference to employ warranty theory to the exclusion of misrepresentation whenever a solicited contractor is involved and the representation relates to the contract work. The ambiguity of the decision is that it did not repudiate that line of cases it specifically recognized as existing which utilized misrepresentation analysis when a solicited contractor and a representation as to contract work was involved. Therefore, while Aerojet General stands for the proposition that warranty theory is not applicable when the representation is made to an unsolicited contractor and does not relate to work under the contract, it does not unequivocally stand for the proposition that warranty theory will be used to the exclusion of affirmative misrepresentation when the representation is made to a solicited contractor and does relate to the contract work. In this latter circumstance, both affirmative misrepresentation and warranty are available theories although warranty theory appears to be judicially preferred.[104]

The question remains, then, what criteria determine whether warranty or misrepresentation theory will be used as the basis of decision when both are available, that is when a material representation of fact concerning the contract work is

made to a solicited contractor. There are at this point in the decisional law no clear answers but only a couple of discernible factors which can be said to influence the selection.

One factor which influences the selection is the theory of recovery that a plaintiff elects as the basis for his lawsuit. From what can be gleaned from the decisional law regarding the pleadings, it appears plaintiffs frequently assert a warranty arising from a material representation of fact as their theory of recovery.[105] This is understandable since warranty theory from the contractor's standpoint is the most beneficial theory as there is no requirement to show government culpability. There are other cases, seemingly less frequent however, where the contractor elects to assert misrepresentation theory.[106] Why this is so when warranty theory is clearly more beneficial is uncertain. The best explanation probably is that offered earlier which is that no decision has seriously undertaken to explain the interface between warranty and misrepresentation theory and the relative advantage of selecting warranty over misrepresentation theory; therefore, the benefits of theory selection are most likely obscure to many plaintiffs. Irrespective of what explains theory selection, when a party brings a lawsuit on the basis of one theory, the courts and boards are usually reluctant to employ another theory as the grounds for recovery. There are exceptions to this rule, however, but the exceptions seem to favor the selection of warranty over misrepresentation theory.

For example, in some cases, as noted earlier, misrepresentation was alleged as the theory of recovery but the courts employed warranty analysis. This is most likely explained by the judicial preference already noted in conjunction with the discussion of the Aerojet decision to utilize warranty theory when a representation concerning contract work is made to a solicited contractor.

This judicial preference for warranty theory is a second influencing factor then. It appears to explain in part the number of cases which refer to the creation of warranties through representations. These cases all concern solicited contractors and the representations relate to work under the contract.[107] Generally, the representation which creates the warranty in these cases is contained in the contract plans, drawings, specifications, or other documents although as Dale Construction Co. illustrates a warranty may arise from an oral representation after award. This judicial preference for warranty theory when a representation regarding contract work is made to a solicited contractor would also be in accord with the two authorities quoted earlier in regard to this subject both of which take the position warranty theory should be employed whenever a "statement related to a matter of business in regard to which action was to be expected"[108] is made. This factor of judicial preference should give way, however, to a firm expression by a plaintiff that he has consciously intended to bring his case on misrepresentation theory and does not desire to pursue recovery on any other basis. This is

implicit in the adversary system which recognizes the right of the moving party to select his cause of action and the right of the defending party to due notice of what he must defend against.

In conclusion, both plaintiff theory selection and a judicial preference for warranty theory influence the process seemingly in favor of the use of warranty theory to the exclusion of misrepresentation theory.

The current relationship between affirmative misrepresentation and warranty theory, then, is murky. In practice, the courts are most likely to use warranty theory when judging material representations of fact made to solicited contractors regarding contract work unless a contractor brings his case on misrepresentation theory and insists on this theory as his exclusive basis for recovery. This is unlikely to occur since warranty theory is more beneficial to a contractor. This tends to relegate misrepresentation as a viable theory, with the exception of the area of estimates which will be discussed more momentarily, to those rare instances, such as in Aerojet General, where standing does not exist to assert the more beneficial theory of warranty. This may be appropriate under modern contract law which gives a broad bredth to warranties and under the current law of government contracts which holds the government to be a warrantor of those matters set forth in the contract plans, specifications, drawings or other documents.[109] Moreover, the role of affirmative misrepresentation has been further truncated by its

relationship with the Differing Site Conditions clause which will be examined at greater length later in this paper. Suffice it to say at this point that a great many cases which could be brought under an affirmative misrepresentation theory in construction contracts are asserted instead under the Differing Site Conditions clause which is itself a form of express government warranty. The most significant current role for affirmative misrepresentation remains in the area of estimates which has been discussed above in the section on forms of representations.[110]

In summary, the role of misrepresentation in current government contracting has been severely circumscribed by a combination of plaintiffs' frequent election to assert warranty theory when a material representation of fact regarding contract work has been made to a solicited contractor, a judicial preference to employ warranty theory under these circumstances and the effect of the Differing Site Conditions clause. Misrepresentation remains viable only in those few cases where a contractor elects to assert it and insists upon it as his basis for recovery, where the contractor does not have standing to assert warranty theory or where estimates are involved. Affirmative misrepresentation is a hoary creature of the early common law which has most likely been overcome in large part by modern government contract practice and theory.

The interface of warranty and misrepresentation theory also provides one of the starkest contrasts between misrepresentation and non-disclosure of superior knowledge.

Non-disclosure of superior knowledge does not involve any representational element as the discussion below in Chapter 2 will demonstrate. There is, consequently, no interface with warranty theory. Since non-disclosure of superior knowledge and warranty operate in respective fields, non-disclosure of superior knowledge retains its vitality and remains today as a frequently asserted theory of contractor recovery.

C. The Falsity of the Representation

One of the most obvious elements of affirmative misrepresentation is that the government's representation must be false. Falsity is established when it is shown that the representation is not in accord with the actual facts.[111] This is resolved by the courts and boards largely as a question of fact[112] and the burden of proving this is on the plaintiff.[113] This burden is normally not too difficult since the circumstances of contract performance usually clearly establish the disparity between what was represented and the actual facts encountered such that both parties are satisfied by the empirical evidence that the representation is false. Sometimes, however, the government is not satisfied its representation is false and the contractor has been put to his burden of proof.[114] On occasion, contractors have had to resort to expert testimony to establish the falsity of the representation. For example, in one case where the government represented that the worksite in the far Pacific was "well outside the normal typhoon zone," the plaintiff was required to call his own expert to testify that such a statement was not in accord with then known meterological facts.[115]

Perhaps the consistently most difficult area for a contractor to carry his burden of showing the falsity of a representation is with estimates since the courts and boards have taken the position that a mere unexplained discrepancy, even a large discrepancy, between the estimate and the actual amount does not establish a breach of the implied

representations of due care, honesty, reasonable accuracy or disclosure of contingencies.[116] Instead, the contractor must establish by specific evidence how the government breached its implied representations. This at times is a difficult burden since the nature of this proof mostly entails access to internal government processes and files and government witnesses and many times concerns matters of judgment in making the estimate over which reasonable men can differ.[117]

Other than in the area of estimates, the element of falsity does not engender much dispute and consequently, it along with the elements of causation and damages discussed below, are the least litigated areas in affirmative misrepresentation. Once a representation has been shown to be false, there is a "misrepresentation." At this point, however, the misrepresentation is not actionable since the remaining elements below must be established.

D.. Government Culpability in Making the Misrepresentation

To establish an actionable affirmative misrepresentation, it is not sufficient that the contractor merely shows a false representation. He must also demonstrate that the government was culpable in making the misrepresentation. This was established early in the decisional law by Midland Land and Improvement Co. v. United States. [118] The contract in this case was for dredging a river. The contractor alleged it encountered material more difficult to dredge than the government borings showed and brought suit based upon misrepresentation. The Court of Claims

rejected the misrepresentation claim finding that the borings accurately reflected the area to be dredged and that the contractor was not misled in any event because of knowledge he already had regarding conditions at the dredging site. The court also stated, however, in regard to the boring logs that:

> The burden of proving misrepresentation rests upon the party making the allegation. It is not to be presumed and one may not, either under the Christie or Hollerbach case, simply show a different condition in some respects from that which the chart or blue prints of borings discloses, and rest his case upon the theory that the court must infer a misrepresentation. There must be some degree of culpability attached to the makers of maps and charts, either that they were knowingly untrue or were prepared as the result of such a serious and egregious error that the court may imply bad faith.[119]

A similar formulation was used by the Court of Claims in Dunbar & Sullivan Dredging Co. v. United States where the court said, "the statements contained in the contract as to the material to be dredged were either known to be false by the Government agents preparing them, or at least constituted such a gross and inexcusable error as to entitle the plaintiff to relief."[120]

These cases established early-on two aspects of the culpability requirement: first, an affirmative misrepresentation is not actionable merely because of an assertion which is not in accord with the facts but, instead, there must be some degree of government culpability in making the assertion; second, knowledge of the assertion's falsity is a sufficient showing of government culpability to render a false assertion actionable. Other, more recent cases, also

confirm that the culpability requirement is met when an assertion is made knowing of its falsity.[121] Additionally, if a representation is made with knowledge of its falsity, it seems as a matter of common sense inference there is an intent to deceive unless there is other evidence suggesting the contrary such as where omissions are intentionally made from the results of boring data under the honest but mistaken belief that the material omitted was not significant.[122] Whether an intent to deceive is established as a matter of inference in this manner or by direct proof such as an admission by the statement's maker of his state of mind, it is also sufficient evidence of culpability.[123] Therefore, where an intent to deceive, or knowledge of the representation's falsity, has been shown either will suffice to establish culpability.

The remaining question is whether culpability is established only by showing a knowingly false representation or intent to deceive, or whether a lesser state of guilty mind such as gross or simple negligence will suffice. Both Midland Land and Improvement Co. and Dunbar & Sullivan Dredging Co. recognized other states of mind would be sufficient to establish culpability by their alternative formulations of "serious and egregious error" and "bad faith" or "gross and inexcusable error" respectively. Unfortunately, these phrases do not provide guidance to their intended content beyond suggesting that some requirement greater than mere inadvertance or innocent accident is necessary.

In a later decision, Morrison-Knudsen Co. v. United

States, discussed above in the section on warranties, the Court of Claims shed some additional light on the culpability requirement. This case concerned a construction contract in Alaska which required considerable excavation work. The government provided boring results of thirty-three test holes; the results relevant to the two holes concerned in the case revealed the presence of no permafrost when in fact considerable permafrost had been encountered. Permafrost is permanently frozen ground. When the contractor proceeded to do the excavation work, he unexpectedly encountered permafrost instead of unfrozen ground which resulted in significantly higher costs. The court observed in respect to the contractor's claim of misrepresentation:

> Perhaps it should be mentioned that there is no evidence in the record indicating any intention on the part of the defendant to deceive the plaintiff (or any other bidder) in connection with the furnishing of the untrue information regarding the subsurface conditions that were encountered in holes 260 and 261. On the contrary, the evidence warrants the inference that the untrue representations made to the plaintiff (and to other prospective bidders) by the defendant were the result of negligence, rather than bad faith, in connection with the preparation of the bid documents. However, the lack of what the Supreme Court has referred to as a "sinister purpose" is immaterial.[124]

The "sinister purpose" mentioned is the Supreme Court's formulation in Christie v. United States [125] and refers to the intent to deceive. The court in Morrison-Knudsen Co. then went on to conclude that the contractor had established an actionable misrepresentation based on the government's negligent misrepresentation of the boring results.

The court, therefore, in Morrison-Knudsen gave content to the vague statements of Midland Land and Improvement Co. and Dunbar & Sullivan Dredging Co. by recognizing that the lack of due care in regard to whether a representation is accurate is adequate proof of culpability. The holding of Morrison-Knudsen has been reaffirmed in several subsequent decisions.[126] For example, in Foster Construction C.A. & Williams Brothers Co. v. United States, the Court of Claims observed "[i]n misrepresentation, the wrong consists of misleading the contractor by a knowingly or negligently untrue representation of fact...."[127]

Since the spectrum of the culpability requirement ranges from representations made with intent to deceive, on one hand, to representations made without due care as to their accuracy, on the other, all mental states normally recognized as falling in between should also suffice. It has already been established this is true in regard to statements knowingly false. The same should also be true for statements made with a reckless or grossly negligent state of mind. The language from Midland Land and Improvement Co. and Dunbar & Sullivan Dredging Co. ("egregious error;" "gross and inexcusable error") certainly seem to suggest this but no cases have been found in researching this paper which specifically so hold.

It is well established in legal precedent, therefore, that a merely false representation is insufficient to establish an actionable affirmative misrepresentation. An additional requirement is government culpability which is satisfied when

the contractor shows the representation is made with the intent to deceive, with knowledge of its falsity or with a mind which is reckless, grossly negligent, or simply negligent as to the representation's accuracy.

The Court of Claims' recent opinion, however, in Summit Timber Co. v. United States [128] casts some doubt on the continuing validity of the culpability requirement. The contract in this case was for the sale of timber. The solicitation paperwork and contract documents made a representation that the cutting area was accurately marked. This in fact was not true. The cutting area was marked such that part of it lay on land which the plaintiff owned located adjacent to the government land containing the timber for sale. The plaintiff bid on the timber sale and won the cutting rights with the result that part of the timber which it cut and paid for it already owned. The plaintiff sued the government for its damages alleging the theory of misrepresentation. One of the government's responses to the plaintiff's suit was that even though the boundary was improperly marked the error was unintentional and due care had been used in establishing the cutting area. The court responded to this assertion thusly:

> A positive, but erroneous, representation in a contract is not rendered innocuous simply because it was due to mere negligence or inadvertance, rather than to bad faith or gross error: "*** the lack of *** a 'sinister purpose' is immaterial." The alleged reasonableness vel non of defendant's error is wholly irrelevant here.[129]

This quotation from Summit Timber reveals that the court

believed an actionable affirmative misrepresentation was established through a showing of mere inadvertance. In other words, the court felt that a false representation per se was sufficient without any requirement that the contractor establish government culpability.

The view of the Summit Timber court is contrary to the established precedent discussed above to the effect that government culpability is required. There are several explanations for the court's opinion. First, the court relied on Morrison-Knudsen Co. v. United States and Everett Plywood and Door Co. v. United States for authority for this novel proposition. The court's reliance on Everett Plywood and Door Co. was inapposite since, as was discussed above in the section on warranties, this case was a warranty, not misrepresentation, decision. Morrison-Knudsen, as discussed above, held that a misrepresentation was actionable only when at a minimum the contractor established government negligence in making the representation. However, as also was pointed out above in the section discussing warranties, Morrison-Knudsen contains some inconsistent language to the effect that the representations regarding the boring results were warranties. It is possible the Summit Timber court erroneously focused on the language in Morrison-Knudsen as to warranties while missing the language in the same opinion as to culpability. The language as to culpability, however, was germane to the court's opinion in Morrison-Knudsen since the court there clearly viewed itself as deciding a misrepresentation, not a warranty, case. The effect

of the Summit Timber opinion in eliminating the culpability requirement is to make affirmative misrepresentation and warranty theory indistinguishable. It may have reached this result mistakenly, therefore, through misreliance on a part of Morrison-Knudsen which was dicta and on Everett Plywood and Door Corporation to the exclusion of other precedent clearly establishing the requirement for government culpability in affirmative misrepresentation cases. A second, disingenuous view, is that the Summit Timber court knew precisely what it was doing. This view would hold that the court's opinion reflects one of those factors which were discussed in the section on warranties, viz., the preference of the courts to use warranty theory to the exclusion of misrepresentation theory when representations regarding contract work made to a solicited contractor are concerned even where use of the warranty theory may be contrary to the theory upon which the contractor brought his lawsuit.

Irrespective of the reason proferred to explain the Summit Timber decision, the opinion is not in accord with the prevalent decisional view that misrepresentation requires some type of government culpability before it is actionable. It is too early to tell whether Summit Timber signifies a departure from the traditional teaching in the affirmative misrepresentation area that will be followed by the other courts and boards.

E. The Representation Must Cause Reliance

In addition to an actionable representation that is

culpably false, the contractor must establish as part of his case proving an affirmative misrepresentation that he in fact relied on the representation in some way. For example, one court has said "[t]he misrepresentation must be relied upon and must induce a party to do something to his detriment he would not otherwise have done."[130] This formulation of causation raises the question of what is it contractors do in reliance on a misrepresentation that would not have otherwise been done. Or put another way, what is it a contractor would have done had he not been induced to do something different by the false representation.

It is clear that misrepresentation affects the contractor's anticipation of contract performance. Analytically, therefore, it seems this in turn can result in one of three courses of action that would have been pursued had the true facts been known.

Probably the most prevalent situation is that since a fixed-price contractor formulates his bid based on his anticipation of contract performance, had the true facts been known the bid would have been increased to cover the contingency. Therefore, if in a construction contract that requires excavation, the government falsely represents that the entire area to be excavated consists of loose soil whereas immediately below the surface exists bedrock, the contractor will formulate his bid based upon excavating loose soil, but had he known the true facts he would have increased his bid price to provide for the additional cost of rock excavation.

This hypothetical situation is very similar to what occurred in the Morrison-Knudsen case discussed above.

A second scenario, seemingly less common than the first, would be that had the contractor known the true facts he would not have attempted the contract at all. This probably was the situation involved in Johnson Electronics discussed above in the section on the forms of representation. There, it will be remembered, the manner the government chose to contract suggested the contract was a standard production contract when in fact extensive research and development beyond the contractor's capability was required. Had the contractor known of the true requirements, it most likely would not have bid on the project at all.

A third, and seemingly the least common situation, is that had the true facts been known, an easy and cost free adjustment to performace would have been possible. In this situation, armed with the true facts the contractor would not have increased his bid price or avoided the contract altogether, but instead would have made an adjustment to performance. L.M. Jones v. United States discussed in the section on the techniques used to determine the existence of a representation is probably illustrative of this point. It will be remembered in this case the contractor was constructing a bridge across a river and his worksite was flooded for an extended period of time due to the combination of the retarding action by a dam under construction and heavy rainfall. The court found the flonding could have been anticipated had the

contractor consulted the hydrographic data referenced in the contract documents. The court further observed that possessed of this knowledge the contractor could have easily avoided his problems by scheduling those parts of the work which were in the flood area for the dry part of the year and the part of the work which was in the dry area for the wet part of the year instead of the converse as he had done.

To establish reliance on the representation, therefore, the contractor will have to show that he would have followed one of these three courses of action had he known the true facts. Proof of reliance on a misrepresentation may be in the form of direct evidence, such as calling an officer of the contractor to testify as to the effect of the representation,[131] or it may be circumstantial, such as showing the representation was highly material to an informed bid and the information upon which the representation was based was otherwise unavailable to the bidders.[132]

The element of causation, along with the elements of falsity discussed above and damages below, produce the least amount of contention and litigation. This is probably due to the fact that once the misrepresentation is established the contractor's course of action in light of the true facts is obvious to the parties.

When litigation does arise in the causation area, it usually involves actual knowledge of the true facts by the contractor.[133] For example, in California Shipbuilding and Dry Dock Co., [134] the government had falsely represented that

removed parts of a ship were stored next to the area where they were to be installed. The Armed Services Board denied recovery on a misrepresentation claim because the contractor's representative had observed during a pre-bid inspection that the parts were not stored next to the area where they were to be installed as represented by the government. The board relied on this fact in finding the contractor was not misled:

> To be actionable as a breach (redressable here as a constructive change) the misrepresentation must mislead, i.e., be relied upon. The contractor at Seattle, before bidding, knew just as well as the Government, through the observation of its personal representative...that the ventilation ducting had been dumped, for the most part, in the areas on the second deck and was not adjacent to the spaces to be served.[135]

Although the board did not explain why the finding of actual knowledge was important to the conclusion the contractor had not been misled, it is clear that where a contractor has actual knowlege of the true facts and, therefore the representation's falsity, it may be inferred that he did not rely on the misrepresentation.

In addition to possession of actual knowledge by the contractor, there are other situations where the contractor may not be in a position to establish reliance on the representation. For example, there are cases where the element of reliance could not be shown because the contractor did not believe the representation to be accurate,[136] was indifferent to whether the representation was accurate[137] or relied on other available data despite the contrary indications of the

representation.[138]

In the main, as was said above, however, this element of affirmative misrepresentation causes few litigation problems.

F. The Reasonableness of the Contractor's Reliance

Closely allied with the element of actual reliance is the requirement that the reliance on the representation be reasonable under all the circumstances. This element probably causes more litigation than any of the other elements of affirmative misrepresentation. It is also perhaps the most difficult element to fully understand. Before engaging in a detailed discussion--including specific case analysis--of the reasonable reliance element, a general overview to introduce the topic would be in order.

Actual contractor reliance on a false representation will not be found to be reasonable where the circumstances were such that the contractor should have known that the representation was false. As a general rule, a contractor is not obligated to investigate the government's representations to insure their accuracy and he is not imputed with knowledge that such an investigation would reveal. As an exception to this general rule, the contractor will be imputed with knowledge of a representation's inaccuracy, i.e., it will be held he should have known of its falsity, where either of two circumstances exist: an affirmative indication is present which warns him he cannot rely on the representation without confirming it or an effective dislcaimer clause is contained in the contract whereby the government makes the contractor responsible for the accuracy of the matter represented. These two exceptions differ in that the former usually exists in the contracting environment without any investigation and serves to

warn the contractor of the need to inquire as to the representation's accuracy whereas the latter results in a requirement the contractor investigate the representation even in the absence of any affirmative indications suggesting such a need. They operate similarly in that each results in the contractor being imputed with knowledge that was discoverable had a reasonable investigation been conducted.

If the contractor's reliance is not reasonable, he will not be entitled to recover under a theory of affirmative misrepresentation. The reasonable reliance requirement acts defensively, then, and prevents the reallocation of the risk of unanticipated difficulties due to government misrepresentation from the fixed-price contractor to the government. The reasonable reliance requirement, therefore, is essentially a concept of contractor fault which supercedes the governments own fault. It acts in much the same way as contributory negligence operates to obviate a charge of negligence in common law tort.

Questions about the reasonableness of reliance arise in cases where the government claims the contractor should have known that the government's representation was false. This assertion is made most often when a reasonable investigation of the facts by the contractor would have revealed the erroneous nature of the representation. Frequently, since so many contracts concern construction, renovation or refurbishment projects, the issue arises in the context of a site investigation with the government asserting that had the

contractor made an on-scene examination of the actual conditions he would have been aware of the error in the representation. In virtually every case, the issue is made more complex by the presence of government disclaimer clauses which in effect attempt to make it the contractor's responsibility to insure the accuracy of the government's representations.

With this general overview in mind, it is now appropriate to consider these specific propositions in detail.

1. The General Rule

The rule governing reasonable reliance in misrepresentation cases has been settled for a long time: in the absence of affirmative indications which cast doubt on the accuracy of a representation or a disclaimer clause which gives the contractor unequivocal notice he is responsible for insuring the accuracy of the government's representations, a contractor is entitled to rely on representations made by the government without confirmation of their accuracy even where the representations could have been easily checked and had they been checked the contractor would have been aware of the representation's falsity.[139]

The cases which set forth the right of the contractor to rely on government repr ..entations without investigation usually cite at least one of three factors in support of the rule: the positive nature of the government's representation; the government's position to know the information represented, especially where the information is uniquely accessible to the

government; and the government's choice to make the representation when it could have foregone the representation altogether.

One of the earliest cases in this area illustrates these points well. The plaintiff in Hollerbach v. United States [140] agreed to repair a dam. The contract specifications represented the dam was backed with "broken stone, sawdust and sediment" when in fact it was backed with sound logs filled with stones. This made the contract work much more difficult and expensive than originally anticipated. The Supreme Court said the following regarding the contractor's right to rely on the specifications without investigation of the actual conditions at the site:

> In paragraph 33 the specifications spoke with certainty as to a part of the conditions to be encountered by the claimants. True the claimants might have penetrated the seven feet of soft slushy sediment by means which would have discovered the log crib work filled with stones which was concealed below, but the specifications assured them of the character of the material, a matter concerning which the government might be presumed to speak with knowledge and authority. We think this positive statement of the specifications must be taken as true and binding upon the government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the government as a basis of the contract left in no doubt. If the Government wished to leave the matter open to the independent investigation of the claimants it might easily have omitted the specification as to the character or the filling back of the dam. In its positive assertion of the nature of this much of the work it made a representation upon which the claimants had a right to rely without an investigation to prove its falsity.[141]

The decision in Hollerbach relied on all three factors in support of its conclusion that the contractor's reliance was reasonable without investigation of the facts. The many other cases which hold the same as Hollerbach rely on one of these same three factors or sometimes, as in Hollerbach, a combination of the factors. A few moments should be devoted to analysis of these factors and why the cases find them significant.

The Supreme Court in Hollerbach, and the courts and boards in a number of other cases, have referred to the positive nature of the representation as one factor which makes contractor reliance without investigation reasonable.[142] The use of the term "positive" is somewhat misleading because it is clear from the decisional law, as Hollerbach illustrates, that what is being referred to is not a representation of special character but a representation of factual matter as opposed to an expression of opinion. Therefore, the "positive representation" means no more than the actionable representation which was discussed earlier in this paper. It is important to the rule that a contractor may rely without investigation on a representation because statements of fact without qualification have a natural proclivity to induce reliance.

Moreover, the Supreme Court in Hollerbach, and the courts and boards in other decisions, have also referred to the matter asserted as being within the knowledge of the government

as an additional factor which makes contractor reliance without investigation reasonable.[143] Sometimes the courts and boards observe that the matter asserted is not merely within the knowledge of the government but is uniquely so because it is knowledge which only the government has access to.[144] It appears the concern at this point is that there be no indications to the contractor that the representation is not intended to be relied on such as might exist if the government were making statements where it clearly had no knowledge of the underlying facts upon which the statement was based. If there are no contrary indications the representation was not intended to be relied on, the natural effect of unqualified factual statements to induce reliance have full force. It has already been discussed in the section on the existence and meaning of representations that similar logic is frequently significant to the decision of whether a representation has been made. This factor, then, cuts across two areas: the government's access to the underlying information upon which its representation is based is important not only as to the determination of whether a representation has been made but also as to whether reliance on the representation without investigation is reasonable.

Finally, the Supreme Court in Hollerbach, and courts and boards in other decisions, have referred to the government's election to make a representation when it could have remained silent on the matter as another important factor supporting the rule that contractor reliance without investigation is reasonable.[145] This factor is important

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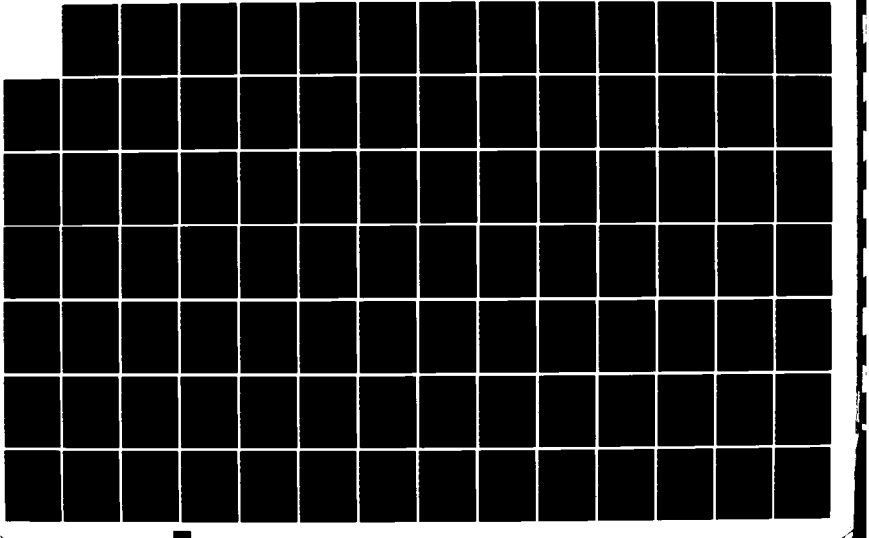

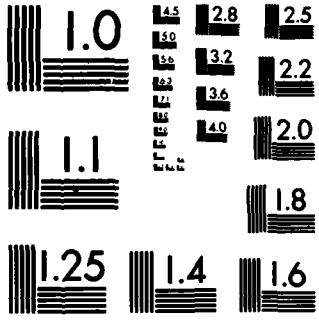

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because it is evidence that the parties, particularly the government which is being charged with the effect of the representation, intended the representation to be relied on. If the government did not intend for the representation to be relied on, it could simply have omitted it from the solicitation or contract. This election was also discussed in the sections on the existence and meaning of representations and forms of representations as one of the factors which is significant to a determination that an implied representation arising from an estimate has been made. It serves as an additional example of a factor which is important both to the determination of whether a representation has been made and whether reliance on the representation is reasonable.

The conclusion drawn from Hollerbach, and other cases like it, is that generally contractor reliance upon a government representation without confirmation is reasonable even where investigation of the facts would reveal the erroneous nature of the representation. This is because the natural inclination of a party to a contract is to rely on statements of fact made to him, particularly where there are no indications that the statements were not intended to be relied on. This natural inclination is reenforced by the fact that the government must have intended for the statements to be relied on or it would have elected to omit them. Finally, all of this exists against the background of the government's obligation to deal with its contractor's in good faith. This ethic makes it reasonable for the contractor to assume the

government's representations are accurate. The remainder of this section will discuss the two aspects which can alter this general rule: affirmative indications and disclaimer clauses, both of which can serve to alert the contractor to the fact he cannot rely on the representations made. Affirmative indications and disclaimer clauses will be discussed in turn.

2. Affirmative Indications

Affirmative indications which give a contractor notice of a representation's possible inaccuracy may serve to prevent the reallocation of the risk of unanticipated difficulties due to the government's misrepresentations. By affirmative indications, it is meant those matters which are usually readily available to a contractor in the existing contractual environment serving to put him on notice of the questionable accuracy of the representation and which do not have to be developed through an investigation of the representation's accuracy. The cases reveal four generic categories of affirmative indications which can give warning the representation is possibly false: knowledge already within the contractor's possession; contract provisions; other data provided by the government; and general warnings provided by the government.

The general rule gleaned from the cases, which will be discussed in more detail momentarily, is that an affirmative indication which gives an unequivocal warning that the representation is possibly false is adequate to place the contractor upon a duty to inquire such that the contractor

bears the responsibility for all misrepresentations that would have been discovered through a reasonable investigation. To constitute an unequivocal warning, it is not necessary that the affirmative indication identifies precisely where or how the representation is inaccurate; rather what is required is that the affirmative indication unambiguously serves to alert a contractor of the possibility the representation is false so that he is apprised he cannot rely on it without further confirmation. An affirmative indication may fail to meet this test because it is uncertain on its face, too general to overcome a more specific representation or fails to properly focus the contractor's attention on the possibility the representation is false. The four generic categories of affirmative indications will be discussed below and in the process these various facets of the rule will be illustrated.

Knowledge that is already in the contractor's possession potentially inconsistent with the matter represented can serve to apprise the contractor of the need to investigate. This knowledge can be obtained from the contractor's prior experience in performing like contracts, which is in the nature of lay experience, or may be due to the contractor's special training or education. An example of the former will be deferred until the discussion of the Morrison-Knudsen case below. The latter is illustrated by Virginia Engineering Co. v. United States, [146] where the Court of Claims found that a construction engineer such as was employed by the plaintiff would have anticipated underground water at the construction

site because of its proximity to tidal water; the court concluded, therefore, that contractor reliance on the government's unrealistic statements as to the low height of the water table was unreasonable.[147] An experienced contractor has also been charged with common knowledge in its industry. In one case, for example, the contractor was deemed to know that a government representation of the interest rates for construction loans would be false by the time of award since it was well known within the industry that the rates were going to be raised.[148] Finally, where the contractor is under no obligation to conduct an investigation of the accuracy of a representation but does so anyway, he will be responsible for knowing of the representation's falsity if information he discovers is sufficient to warn him to make further inquiries. For example, in Mallory Engineering, Inc. [149] the government recommended in the solicitation specifications a certain brand name type of switch with a special feature. Prior to bidding, the contractor checked with its supplier about the availability of the switch and was told that the manufacturer's catalog did not list such a switch with that feature; however, the contractor did not check further since the supplier opined that such a switch must exist if the government said it did. The switch with the feature did not exist as represented in the solicitation. The Armed Services Board held the contractor was not entitled to recover the cost of designing and manufacturing the switch because it had learned of sufficient facts during its pre-bid investigation to obligate it to check further as to

the switch's commercial availability.

Contractor knowledge will not serve to notify the contractor of the need to investigate, however, where it fails to focus the attention of the contractor on the possibility the representation is false. In Summit Timber Co. v. United States, discussed above in the section on culpability, the government alleged the contractor's reliance on the government's representation as to the boundaries was not reasonable because one of the plaintiff's employees had inspected the cut area before the bidding and was, therefore, aware of the boundaries and should have been aware of their inaccuracy. The court rejected the government's position because the attention of the employee's investigation was on the quantity and quality of timber available for recovery and not on the boundary markings.

In other cases, the government may provide a warning of the representation's falsity either through potentially inconsistent contract provisions[150] or data.[151] The case of Morrison-Knudsen Co. v. United States, discussed earlier in the warranty and culpability sections, illustrates these points as well as the point of contractor lay experience discussed above. The contract in this case was for construction in Alaska which required ground excavation. The government had made thirty-three test borings; on two of the borings the results reported showed the presence of no permafrost when in fact permafrost was encountered when taking the borings. Permafrost is permanently frozen ground and is considerably

more difficult to excavate than unfrozen soil. The plaintiff brought suit to recover its increased costs, due to encountering permafrost in the excavation area, on the basis that the misrepresentation of the results of the two boring holes caused it to anticipate the absence of permafrost in the whole excavation area. The Court of Claims concluded the contractor was not entitled to recover its entire increased costs because it should not have been misled into believing that the entire area would be permafrost free. In support of this, the court observed the contractor was experienced in construction in that general area and should have known of the widespread presence of permafrost from its work on prior projects. Moreover, the contract contained a provision advising of the likelihood of encountering permafrost in the area. Finally, thirteen other borings taken in the same general area of the two borings and reported at the same time as the two borings revealed the presence of permafrost in the area. All these factors served to apprise the contractor of the possibility of encountering permafrost. The court did find, however, that since the boring results were accurate within a radius of ten feet the contractor was entitled to recover for the excavaton of permafrost encountered within that area around the two holes where the boring results were misrepresented.

This case serves as an excellent example of where the contractor may be warned by affirmative indications such that his unquestioned reliance on government representations is

unreasonable. Here, it was held the contractor was not misled into believing the entire excavation area was permafrost free because the contrary indications which were readily available to the contractor in the contracting environment should have made him realize otherwise. Moreover, the case illustrates that a warning may be effected through the use of more than one type of affirmative indication; here there was a combination of contractor experience, government provided data (the other boring results) and an inconsistent contract provision. Finally, in allowing recovery for excavation of permafrost within the ten feet contiguous area of the two boring holes where the results were misrepresented, the court recognized that the general nature of the affirmative indications, although sufficient to dispel any notion the entire excavation area would be permafrost free, was not sufficient to overcome the more specific effect of the misrepresentation as it pertained to the area immediately surrounding the holes.

Where the government claims that contract provisions give the contractor notice of the possible falsity of the representation, the courts have required the contract provision be plainly inconsistent with the representation. If it is not, it will not be deemed to give adequate notice. For example, in Virginia Engineering Co., discussed above, the government claimed the contractor should have been aware of the high water table because of a contract provision that required excavations to be free of water during the laying of concrete. According to the government, this impliedly notified the contractor of

the possibility there was a high water table in the construction area. The court rejected this contention since the provision was also consistent with the notion that heavy rains might cause accumulation of water at the worksite; therefore, the contract provisions did not provide a sufficently clear warning of the high water table.[152]

This contrasts with the contract warning in Morrison-Knudsen which gave unequivocal notice of the possibility of encountering permafrost in the excavation area. The alleged contract warning in Virginia Engineering was implied whereas the contract warning in Morrison-Knudsen was express. Therefore, it can be concluded the government will encounter greater difficulty in asserting a contract warning as an affirmatve indication which should make the contractor aware of the representation's falsity where it relies on an implied as opposed to an express warning.

Finally, the government may give general warnings to the contractor which can apprise him of the need to investigate all representations. The contract in H. N. Bailey & Associates v. United States [153] was for the casting and manufacture of manganese-bronze alloy hooks used for aerial recovery of packages returning from space. Prior to award, the contractor had been asked to confirm its bid and was warned the contract was difficult to perform. The casting process for these hooks was indeed difficult and the contractor subsequently suffered a default termination. The contractor contested the default termination on among other grounds that the government had

impliedly represented the contract was a simple production contract because it was a 100% small business set-aside, contained a short delivery schedule and required no preproduction samples. The Court of Claims rejected the contractor's claim it was misled by the manner of contracting and stated:

> Plaintiff argues that all these factors considered together and in context present a misleading image of the true nature and requirement of the procurement. We are convinced, however, that any slight misleading impression engendered by the RFP would have been more than offset by defendant's request for bid confirmation and defendant's preproduction warning, although expressed in general terms, that the manufacturing process plaintiff was about to undertake was going to be difficult. It is not critical whether plaintiff was specifically told how much lower was his bid than the next lowest bidder. A request for bid confirmation is intended to put a prudent contractor on notice that the Government questions at least some part of the bid proposal. Consequently, a thorough investigation of all aspects of the proposed procurement is appropriate and this would include all technical procedures. Moreover, when plaintiff was informed that the project would be difficult, it was presented with an ideal opportunity to inquire into all the complexities of the metallurgical casting process it was about to undertake.[154]

The H. N. Bailey case is not only an excellent example of where general government warnings may make unquestioned contractor reliance on representations unreasonable, but it also illustrates (in the emphasized language) that the affirmative indications that warn a contractor to investigate the government's representations need not identify with precision where or how the representation is false as long as the warning unequivocally gives notice that the representation may not be

relied on without confirmation.[155]

In summary, then, although a contractor may generally rely on government representations without confirming their accuracy, this situation may be altered if there are indications in the contracting environment which warn him otherwise. Such indications include the contractor's own experience and expertise, inconsistent contract provisions, government provided data and government warnings which generally counsel caution. An indication to be effective in requiring contractor investigation of the government's representation need not identify precisely how or why the representation is false as long as it provides unambiguous notice of the possible inaccuracy of the representation. An indication may fail to do so if it does not draw the contractor's attention to the possible problem, is not sufficiently detailed to overcome a more specific representation, or is itself ambiguous in the warning it provides.

3. Disclaimer Clauses

The general rule that a contractor may rely upon government representations without investigation of their accuracy can also be altered by an effective disclaimer. Disclaimer clauses are used frequently in government contracts and they come in many forms. The exact language may change from clause to clause but most clauses, except those specifically tailored for the contract in question, fall into the following general categories:

a. Clauses which require bidders to check all drawings, specifications, schedules and instructions in the preparation of bids.[156]

b. Clauses which state the representations are not guaranteed.[157]

c. Clauses stating amounts given are "estimates" or "approximations" only.[158]

d. Clauses stating government furnished property is provided "as is."[159]

e. Clauses requiring the bidders to examine the site of the work and make their own assessment of the conditions and nature of the work.[160]

These categories of disclaimer clauses can be segregated into two generic types. There are those clauses, such as categories "b-d," which disclaim the effect of any representation; although they do not attempt to place any duty on the contractor to confirm the matter represented, this duty is implicit in the government's denial of any responsibility for the matter represented. On the other hand, there are those clauses, as in categories "a" and "e," which do place a duty upon the contractor to investigate the matters represented;

although these clauses do not normally disclaim the representations directly, this is done impliedly by placing the obligation to investigate on the contractor. Oftentimes, more than one category or generic type of clause will appear in the same contract.[161]

When disclaimer clauses are employed with respect to representations, therefore, the government attempts to prevent the reallocation of the risk for unanticipated contractor difficulties due to government misrepresentations by specific contract language making the contractor responsible for the accuracy of the representations. It then becomes the contractor's responsibility to investigate the government's representations. The disclaimer clause as a risk allocation device differs from affirmative indications in that there is nothing already existing in the contractual environment warning a contractor to investigate. Rather, the obligation to investigate arises from a contractual disclaimer provision.

It was noted earlier that the natural effect of a representation of fact made under circumstances where the government appears knowledgeable is to induce reliance since the government can always omit the representation if it intends otherwise. This is what serves as the foundation for the general rule that the contractor can rely on government representations without checking them. The purpose of a disclaimer clause is to negate this natural effect of the representation. When the government makes both a representation and a disclaimer in the same contract,

therefore, it has used provisions which are potentially inconsistent. This attempt to have it both ways has caused the courts and boards a great deal of difficulty.

Thus, the general proposition can be set forth that although disclaimer clauses are not against public policy and therefore void in toto, they are not favored by the courts and boards.[162] The courts and boards, therefore, will oftentimes attempt to give a consistent interpretation to the representation and disclaimer provisions and, thereby, avoid any inconsistency. The reason for this is the rule of contract interpretation, discussed earlier in the section on the existence and meaning of representations, which is to give effect if possible to every contract provision and leave none meaningless. This is done usually either by finding the disclaimer clause was intended to apply to some aspect other than the representation as relied on by the contractor or by finding the factual assumption underlying the disclaimer clause was inapplicable in the case at hand.

As to the former, the courts and boards will many times attempt to give a meaning to the disclaimer clause which leaves the representation effective; practically, this results in a finding that the disclaimer clause was intended by the parties to achieve some consistent contractual purpose and not to negate the representation the plaintiff-contractor alleges he relied on. It oftentimes seems in these cases the court's or board's determination of the parties' contractual intent is a fiction since the language in the disclaimer clause appears on

its face to be intended precisely to negate the representation made and this is confirmed by the fact of the government's presence in court proferring the disclaimer clause in its defense. The result in these cases, then, is many times better explained by the desire of the courts and boards to achieve an equitable result under all the circumstances as opposed to a true divining of the actual intent of the parties at the time of contracting.

These principles are well illustrated by a recent case out of the newly formed Federal Circuit, Teledyne Lewisburg v. United States. [163] The contract in this case was for the manufacture of radio sets for the Marine Corps. The radio sets had been produced under a previous development contract and this was the first production buy. The contract provided performance specifications identical to those under the development contract and also required the manufactured units to be identical to those already in the Marine inventory to enhance interchangeability and logistical support. To achieve these requirements, the RFP stated that after award the government would provide a model radio and the drawing package for the radio, both of which had been accepted under the prior development contract. However, the RFP also contained disclaimer language, which was later incorporated into the contract, that "the Government does not represent that the Manufacturing Drawings...are complete and accurate and free from omissions, errors, inconsistencies or other defects and it does not represent that the equipment or repair parts made in

accordance with the Government Furnished Radio...and Manufacturing Drawings...will meet the performance or other requirements of this contract."[164] The contractor undertook as part of the contract to conform the government furnished drawings to the government furnished radio since it was anticipated that the drawings differed from the actual production unit in some minor details. The contractor also undertook to meet specified electromagnetic interference (EMI) requirements in the production of the radio. It proposed to do this under a government approved control plan by "reverse engineering" the model, which it presumed had satisfied the EMI requirements. During contract performance, it was discovered the drawings were considerably different than the radio which resulted in much greater conformance work than anticipated; this was due to the fact that the government had mistakenly given the contractor out of date drawings as opposed to the more current drawings it had. During contract performance, it also developed the contractor could not meet the EMI requirements and a waiver was eventually granted; subsequently, the contractor discovered the same EMI problems had occurred in the development contract with the same waivers given, but the government had never revealed this or that the model radio provided did not meet the EMI requirements.

The contractor claimed for his additional costs of conforming the drawings to the model as well as his costs expended in fruitlessly attempting to meet the EMI specifications before he was granted a waiver. The court

observed that the government had impliedly represented that the plans were essentially identical to the model and that the model met the EMI specifications. These implied representations arose from the conjunction of the facts that the model and plans had been accepted under a previous development contract with identical specifications, were provided to achieve interchangeability with those items produced under the development contract and already in use, and additionally with regard to the EMI requirement, the government had approved plaintiff's plan to reverse engineer the model to achieve the EMI requirements without advising it the model did not meet the EMI specifications. In regard to the disclaimer language, the court refused to give effect to its full bredth. Instead, relying on the proposition that it would be "inane to suppose that the representations in this case were made and the government information and equipment in this case were furnished 'for no purpose,'"[165] the court held that the disclaimer was intended to cover only minor discrepancies between the drawings and the radio and the radio and the specifications and neither problem actually encountered by the contractor fell into this category.

The Teledyne Lewisburg decision is an excellent example of how far the courts will go in attempting to find a consistent construction between disclaimer and representational clauses to avoid the Hobson's choice of giving effect to one provision or the other.[166] The disclaimer language used by the government clearly negated any representation that the

model and plans or the model and specifications were consistent. Nevertheless, the court refused to give effect to the clear disclaimer language but instead sought a construction which gave meaning to both provisions. This case exemplifies, then, how difficult it can be for the government to make an effective disclaimer.

The Baifield Industries, Inc. case discussed above in the section on the existence and meaning of representations further illustrates these principles. In that case, the government had provided equipment to be used in the performance of the contract which called for the manufacture of cartridges. The equipment was supplied with codes to describe its current condition since it had been in storage for ten years and it was not in a position that the bidders could operate it to determine its status. Code "O" meant the equipment was operable and code "R" meant it needed repair. The contract also provided the equipment was furnished "as is." Some of the equipment coded "O" was not operable and the contractor claimed for his costs of servicing it. The government defended by saying any representations made had been disclaimed by the "as is" language. After finding the codes were representations, using the methodology discussed earlier, the Armed Services Board then considered the effect of the "as is" language. Declaring "[i]t is fundamental contract law that a contract is to be read as a whole and that when possible, compatible meaning rather than conflict is to be given to the individual parts,"[167] the board concluded that the "as is" provisions

applied to the "0" equipment only after it had been installed and was found to be operable. In other words, the "as is" did not disclaim the current status of the equipment only its usefulness in the future after its current operability had been established. This case further illustrates how the courts and boards will take what appears to be a clear and inconsistent disclaimer clause and strive to find a meaning for it consistent with the representation made.[168]

The courts and boards will use a second technique to avoid having to choose between potentially inconsistent disclaimer and representational clauses. This technique involves finding the factual predicate which underlies the disclaimer clause to be inoperative in the case under review. The general types of disclaimer clauses were discussed above. Irrespective of whether the government chooses in its disclaimer to merely negate the representational language or go the additional step and place an affirmative duty on the contractor to investigate, the intended effect is the same: the contractor had better investigate and confirm the accuracy of the representation since he will bear the risk of its inaccuracy. Frequently, however, the factual realities at the time of contracting are such that a reasonable investigation would not have been possible. Therefore, disclaimer clauses have not been given effect where the bidding time is insufficient to make the investigations contemplated,[169] the condition to which the representation relates is latent and not discoverable,[170] the government does not permit adequate

access to the site to conduct the investigation,[171] the investigation required would entail extraordinary effort and cost,[172] or the investigation would require expertise beyond that normally possessed by a reasonably experienced and competent contractor.[173] In these circumstances, the courts and boards can find the disclaimer clause inapplicable to the case at hand and give full effect to the representation.

The question remaining is under what circumstances will the courts and boards agree the government has effectively disclaimed a representation. The answer appears to be that an absolutely clear and unequivocal disclaimer is required such that it gives notice to a contractor that the risk of the government's misrepresentations will remain with him. The emphasis is on notice and the cases which find a disclaimer effective or ineffective do so for reasons all of which appear to pertain to this notice requirement. For example, it has been held that broad disclaimer clauses, particularly standard form ("boilerplate") clauses, will not be effective in negating a more specific representational clause.[174] This is sensible since standard clauses may not be examined by a prospective contractor with as much attention as tailored clauses and it is also reasonable to assume the specific representational clause is intended to prevail over the broad disclaimer clause. The effect, then, of broad, standard clauses is a failure to adequately apprise the contractor of his responsibility for government misrepresentations. On the other hand, the following elements have been used in successful disclaimer

clauses: the disclaimer language clearly conveyed a disclaimer,[175] the disclaimer clause was conspicuously placed and not hidden in small print or remote clauses,[176] the disclaimer language was repeated several times at different points in the contract for emphasis,[177] and the clause was specifically tailored for the representation being negated.[178] In these circumstances, the disclaimer provision can be viewed as providing clear notice to the contractor of his responsibility for government misrepresentations.

Moreover, important to a successful disclaimer may be the fact that the information as disclaimed is still useful to a contractor. For example, in one case where the government furnished drawings of an item to be produced in accordance with performance specifications but disclaimed the accuracy of the drawings, the board found it significant in upholding the effectiveness of the disclaimer that the drawings although inaccurate in large part were still useful to the contractor as a guide in establishing tolerances and in making his own construction drawings.[179] The rationale for this rule appears to be that giving effect to a disclaimer under these circumstances is reasonable since enforcing the disclaimer would not conflict with the government's act of furnishing information to the contractor and, therefore, no contractual provision or act is rendered meaningless through recognition of the disclaimer's efficacy. It can be reasoned this rule is related to the concept of notice since the contractor should be apprised under these circumstances that the government intends

for the disclaimer to be effective.

Finally, the circumstances surrounding contract formation may serve to notify the contractor of the effectiveness of the disclaimer. For example, in one case involving contract work on a pier where the government had represented the measurements of certain parts, but also warned contractors to verify all dimensions, the court held this disclaimer effective.[180] The court relied on the fact that the contractor could not expect the measurements to be accurate in light of the pier's settling and constant bumping by ships over the years. In this case, therefore, the general circumstances surrounding the contract work served to apprise the contractor that the government's disclaimer requiring verfication was intended to prevail over the dimensional representations. Additionally, where information is not exclusively in the government's possession and is equally available to contractors, this has been used in finding an effective disclaimer.[181] The rationale appears to be that under these circumtances, since a contractor may as easily discover the facts for himself, he is apprised that the government intends to give effect to the disclaimer over the representational language in the contract.

Whenever the government successfully asserts a disclaimer, it has used a combination of some or all of these elements, and the ultimate effect has been to provide clear notice to the contractor that he is responsible for the information represented.

If the disclaimer does not provide effective notice of the contractor's responsibility for the government's misrepresentations such that it is not given effect and the courts and boards do not find a consistent interpretation between the disclaimer and representational clause or do not find the factual predicate for the disclaimer provision inoperative, the disclaimer language will be ignored and effect given only to the representation.[182] This is well established in the cases and this is the meaning of that part of the Hollerbach decision quoted above where the court found the representational provision was not overcome by the "general language of the other paragraphs...requiring independent investigation of the facts."

Before leaving this section on disclaimers, a few words of special attention to site investigation clauses are in order. The site investigation clause, as noted above, is a special type of disclaimer provision because it places an affirmative duty on the contractor to investigate and by doing so impliedly negates the representations made.[183] The concept of a site investigation clause plays a signficant role in the non-disclosure of superior knowledge but plays a minimum role in affirmative misrepresentation. This is due to the general rule that a contractor may rely on representations without investigating them; since a representation is involved in affirmative misrepresentation but not in non-disclosure of superior knowledge, a contractor has no obligation to investigate those matters represented in affirmative

misrepresentation. Therefore, it is well accepted that when the government makes a representation as to site conditions and the contractor foregoes a site investigation as to that matter in reliance on the representation, the contractor is still entitled to recover his damages due to the misrepresentation.[184] There is an exception to this rule, however. If the contractor in making a site investigation as to those matters as to which the government has made no representations discovers a representation which the government has made is inaccurate or discovers facts which provide him notice that the government's representations may not be accurate such that he is warned he should check further, he is then not relieved of responsibility for any of the misrepresentations to which the information discovered pertains.[185] This exception is, of course, an extension of the actual knowledge and affirmative indications rules, discussed above, to the area of site investigations.

G. Detriment

The final element which must be proven by a contractor to establish a case of affirmative misrepresentation is detriment. Detriment is proven when the contractor shows that the course of action he was induced to follow in reliance on the misrepresentation was more costly than the course of action he would have followed in the absence of the misrepresentation.[186] Since most representations cause the fixed price contractor to bid lower than he would otherwise have done, as was discussed in the section on causation, detriment is shown when the contractor establishes he would have bid a higher price. If the representation caused the contractor to bid on a contract he would not have otherwise attempted or failed to make an adjustment in contract performance that otherwise would have been made, detriment will be shown where the contractor establishes a loss on the contract or shows the unadjusted performance was more expensive than the adjusted performance.

Some of the litigation in this area concerns how to measure the damages or equitable adjustment as appropriate and is beyond the scope of this paper.[187] Occasionally, an issue does arise as to whether the detriment was in fact caused by reliance on the government's representation or by some intervening factor unrelated to the representation. For example, in Micrecord v. United States, discussed above in the section on the existence and meaning of the representation, the court found, even assuming the government had represented a

firm number of drawings to be microfilmed, that the contractor had failed to show its increased costs were due to reliance on the representation. The evidence established instead that the contractor made serious estimating errors in its bid, suffered expensive delays due to dealings with a subcontractor and failed to keep accurate production records all of which accounted for the increased costs suffered.[188]

The Micrecord case, and others in this area,[189] demonstrate that at times contractors are not sufficiently alert when presenting their cases before the courts or boards to the nexus between causation and detriment. For example, the decision in Micrecord reflects that much of the information relied on by the court in finding other causes for the detriment were pled in the contractor's petition. Perhaps this inattention to detail is explained by the contractor's focus on the more contentious elements of misrepresentation such as establishing an actionable representation, culpability or reasonable reliance. Detriment is a necessary element, however, and failure to adequately establish it can ruin an otherwise good misrepresentation case.[190]

H. Remedies

Once the elements of an affirmative misrepresentation have been established as set forth and discussed in the sections above, the misrepresentation is actionable and the question is then what remedies are available. Generally, in misrepresentation cases the contractor has been able to complete performance but at a price higher than he anticipated

because of the government's misrepresentation. In this situation, the contractor is normally interested in recovering his losses due to the misrepresentation and is looking for some type of monetary compensation. Occasionally, the misrepresentation may make contract performance impossible or uneconomical. In this situation, the contractor may be seeking some way to avoid the contract or change an already existing default termination into a termination for convenience. An actionable misrepresentation has been held to offer a remedy in each of these posited situations.

An actionable misrepresentation can result in monetary relief in two ways: damages and an equitable adjustment under a contract adjustment clause. Misrepresentation is a breach of contract and when brought in a court of law damages may be sought.[191] However, until the Contract Disputes Act of 1978,[192] it was firmly settled that administrative boards of contract appeal did not have jurisdiction over breach of contract claims but could administer claims only as they arose under specific contract adjustment clauses.[193] Since it had been held prior to the Disputes Act that if a contract adjustment clause afforded a remedy a claim had to be brought to an administrative appeals board first with appeal therefrom to a court of law on the record made at the board,[194] the question arose whether misrepresentation could be remedied under any of the standard contract adjustment clauses.

One of the standard contract adjustment clauses is the Changes clause.[195] This clause allows a contractor an

equitable monetary adjustment whenever the government orders a change in the contract work. It has been recognized for a substantial period of time that misrepresentation may be remedied by the boards of contract appeal under the standard Changes clause as a constructive change.[196] The theory of change is simply that as the conditions actually encountered differ from those represented, the government, due to its fault in making the representation, has constructively changed the contract to encompass the situation as it actually exists. To be entitled to a constructive change for misrepresentation, the contractor will be required to prove an actionable case of misrepresentation including all the elements discussed above;[197] this differs somewhat from the situation where a misrepresentation is remedied under the Differing Site Conditions clause discussed below. The constructive change doctrine is used as a vehicle to remedy government misrepresentation mostly in those cases where the misrepresentation does not relate to subsurface or latent physical conditions at a construction site.[198]

Complementing the Changes clause as a potential contract adjustment provision to remedy misrepresentation is the standard Differing Site Conditions clause required to be in all government fixed-price construction contracts.[199] This clause provides inter alia that an equitable adjustment in the contract price will be made for "subsurface or latent physical conditions which differ materially from those indicated in the contract." The clause is the result of a government policy

decision to attempt to take some of the risk out of construction contracts where subsurface conditions are involved and thereby save itself some money. When the government chooses not to make any representations regarding subsurface conditions one of a number of things may happen, none of which are good from the government's standpoint: bidders may include contingencies in their bids to cover the risks of working in the earth's crust which results in substantially higher bid prices; some bidders may be deterred by the risks of working in the earth's crust and forego bidding which decreases competition again resulting in higher bid prices; or bidders may choose to do their own subsurface investigations again resulting in increased bid costs and also likely inconvenience and disruption to the government as bidders invade government property for this purpose.[200] The government's solution to this dilemma is oftentimes to make its own investigations and represent the results to bidders. The risk to bidders is further diminished by the Differing Site Conditions clause which guarantees bidders they will be reimbursed if the subsurface or latent physical conditions actually differ from those indicated by the government.[201]

A claim for an equitable adjustment under the Differing Site Conditions clause obviously is available to remedy government misrepresentations concerning subsurface or latent physical conditions. Such a claim under the clause varies from a standard action for misrepresentation in two particulars, however. First, the clause requires only that the conditions

be "indicated." The courts and boards have held that implications and inferences insufficient to amount to an actionable representation for misrepresentation theory are nevertheless sufficient "indications" to meet the requirements of the clause.[202] Secondly, unlike misrepresentation, there is no need for the contractor to establish the government was culpable in making the erroneous indications.[203] The remaining elements of proof between misrepresentation and the Differing Site Conditions clause are the same: the contractor must have relied on the contract indications, the indications must differ from those actually encountered, the contractor must have suffered detriment because of his reliance and the contractor's reliance must have been reasonable.[204]

This analysis leads to an overlay comparison of misrepresentation and a claim under the Differing Site Conditions clause. When there is an actionable misrepresentation under misrepresentation theory concerning a suburface or latent physical condition there will be a provable claim under the Differing Site Conditions clause; the converse is not always true, however, since there is no representational or culpability requirement for a differing site conditions claim and, therefore, an actionable claim under the Differing Site Conditions clause will not establish an actionable misrepresentation under misrepresentation theory unless these additional elements can be shown. On the other hand, misrepresentation theory obviously applies to a wider range of factual situtations since it is not restricted to government

representations relating to subsurface or latent physical conditions in construction contracts.

The significance of the Differing Site Conditions clause is that it has diminished greatly the role of misrepresentation theory in government contracts. It was observed earlier in the introduction to this chapter that the bulk of misrepresentation cases arise in construction contracts and the bulk of these concern the government's representations regarding subsurface conditions. A contractor faced with a claim relating to misrepresentation of subsurface or latent physical conditions at the work site will normally prefer to assert his claim under a differing site conditions theory since he will not have to establish culpability or an actionable representation as he would under misrepresentation theory. Although some of the decisions reflect that cases of misrepresentation as to subsurface or latent physical conditions have been decided on misrepresentation theory with proof of all the misrepresentation elements and the Differing Site Conditons clause then referred to for a remedy,[205] the vast bulk of these cases are brought and decided on a differing site conditions theory with no showing of culpability or an actionable representation.[206] Therefore, the Differing Site Conditions clause has greatly displaced misrepresentation theory in relation to claims pertaining to misrepresentation of subsurface or latent physical conditions at a construction site.

Misrepresentation type cases, then, may be remedied

under standard contract adjustment clauses as a constructive change or as a differing site condition. Since the Contract Disputes Act of 1978, however, the administrative boards have also had jurisdiction to hear breach of contract claims. A breach of contract claim might be more attractive to a contractor than an equitable adjustment under the standard adjustment clauses in some cases since the adjustment clauses are usually subject to notice requirements and the cost priniciples. The question, then, is does a contractor have a right to elect remedies. The Armed Services Board's recent opinion in Johnson & Son Erectors suggests that where a claim in theory is remediable both as a breach of contract or as an equitable adjustment before a board of contract appeals a contractor will not have an election of remedies but must assert the equitable adjustment.[207] The board in this case dismissed an alternative breach of contract claim for non-disclosure of superior knowledge where there was also an identical claim on the basis of constructive change. The Johnson & Son Erectors case has been subsequently followed.[208] Therefore, it appears that when a contractor asserts a claim for misrepresentation before an appeals board he will have to do so as an equitable adjustment if an adjustment clause is available.

Sometimes a contractor is not interested in making a claim for money but rather in avoiding a contract which if performed would clearly cause him to lose money. He may be able to do so in two ways. Misrepresentation will serve as a

grounds for contract recission if the misrepresentation is material.[209] The rule is that a contract formed on the basis of a material misrepresentation is voidable.[210] Upon learning of the misrepresentation the contractor must elect to perform or continue performance if performance has already commenced, and then seek his monetary losses, or to rescind the contract.[211] If he elects to rescind the contract, he will be restored to his status quo ante. [212] Moreover, misrepresentation may afford a contractor the right to discontinue performance under a theory of material breach and sue for his damages.[213] Whether a breach is material depends on the "nature of the breach, and the impact on the contractor's ability to perform."[214] The contractor's decision to discontinue performance under a material breach theory is an a priori judgment call; therefore, it seems if he is wrong about the materiality of the breach and elects to discontinue performance, he risks a proper default termination. An election to avoid performance because of a material breach due to the government's misrepresentation, consequently, can become a gamble and may be limited in practice by the realities of the situation. The contractor's alternative, and safer, remedy would be to continue performance and seek monetary compensation.

Misrepresentation may also result in a number of miscellaneous other remedies. It can serve as a grounds for changing a default termination into a convenience termination,[215] cancelling an IFB[216] or equitable

reformation of the contract terms.[217] Moreover, where there is a negligent misrepresentation by the government, both parties may be in the position of having made a mutual mistake, and the right to relief has been recognized under mutual mistake theory in these circumstances.[218] The virtue of this theory is that a contractor who was negligent in relying on the government's representation because of affirmative indications which gave him notice to inquire further and is thereby barred from recovering under misrepresentation theory, may nevertheless be entitled to recover under an analysis which views negligent misrepresentation as mutual mistake.[219]

Chapter II: Non-disclosure of Superior Knowledge

A. Introduction

The title for this chapter, "non-disclosure of superior knowledge," is aptly and precisley chosen. This is because a mere non-disclosure of knowledge by the government is not a sufficient showing by the fixed-priced contractor to warrant a reallocation of the risk of unanticipated difficulties due to the failure to reveal the information by the government; the contractor must also show among other things that the government was in possession of "superior knowledge." "Superior knowledge" does not mean knowledge that is arcane, abstruse or hyper-technical, although the information which the government possessed and did not reveal certainly may meet these criteria. Rather, "superior knowledge" means information which the government knows, or should know, but which the contractor does not have a reasonable means for obtaining. "Superior knowledge," therefore, does not connote the qualitative nature of the information not revealed as much as it does the relative access of the parties to information. These aspects of non-disclosure of superior knowledge will be discussed at greater length below. For brevity, however, the non-disclosure of superior knowledge in this chapter will simply be referred to as superior knowledge.

Superior knowledge cases, like misrepresentation, arise in all types of federal contracting: construction, manufacturing, supply and service contracts.[220] The most prevalent type of contracting in which the doctrine arises is

in construction contracts, followed by manufacturing contracts and then supply and service contracts.[221] Construction contracting leads the list because the government has oftentimes made investigations, or otherwise knows, about the physical conditions at a construction site; moreover, in manufacturing contracts the government frequently has technical information and experience from prior contracts relevant to the production of the items contracted for. These two types of contracts, then, serve as a fruitful area for litigation when the government fails to disclose what it knows. The superior knowledge doctrine also arises in all types of factual contexts; specific examples are provided in the margin.[222] Superior knowledge, moreover, can be asserted in cases for the disposition of federal property as well as in contracts for procurement.[223] Finally, the superior knowledge doctrine usually relates to information which should have been disclosed during the bidding and solicitation process; however, the government will be held responsible for the failure to disclose relevant information after award concerning problems that do not become apparent to either party until performance.[224] In all these respects, then, the superior knowledge doctrine parallels misrepresentation as was discussed in Chapter 1.

The plaintiff in a superior knowledge case, just as in a misrepresentation case, will have to show two prerequisites before the risk of unanticipated difficulties due to the government's failure to disclose information are reallocated to the government: the superior knowledge doctrine is available in

the context of the specific case and, if so, all the elements have been established. The first requirement, that superior knowledge theory is applicable to the case, may be absent in either of two instances: the contractor does not have "standing" to assert the doctrine or the risk involved has specifically been assumed by the contractor and the government, thereby, contractually has been relieved of any responsibility for withholding information.

The issue of standing was addressed in Aerojet-General Corporation v. United States discussed above in the misrepresentation chapter. The plaintiff in this case coupled his claims of misrepresentation with several claims of superior knowledge. The thrust of the superior knowledge claims were that the government was well aware at the time of the takeover that the target company was losing heavily on the contract but did not inform the plaintiff. With respect to the plaintiff's right to assert a superior knowledge theory, the Court of Claims observed:

> [P]laintiff puts itself in the same posture as a successful bidder.... On this phase of the case, too, we see Aerojet in the quite different light of a would-be intervenor coming to the United States for information, not as to the scope or conditions of the work or the specifications, but as to the chances of the work's being done within the sum which had already been bid. In a fixed-price agreement, the latter is not normally a matter as to which the Government has any direct responsibility.
>
> ....
>
> ...There was no such relationship as called upon defendant to volunteer the particular items plaintiff mentions....[225]

Based on the plaintiff's failure to demonstrate "standing,"

therefore, the court denied the superior knowledge claims.

The current status of the "standing" requirement in superior knowledge cases is unclear. Aerojet-General is the only case that has been discovered that has dealt with the requirement; therefore, there is a paucity of judicial discussion on the matter. Moreover, as the quoted language demonstrates, it is uncertain whether Aerojet-General would have had standing in the court's view to assert the superior knowledge doctrine even as an "intervenor" if its inquiries had related to the work or specifications. In other words, it is unclear whether to demonstrate standing to assert a superior knowledge claim a plaintiff must show that he was both solicited to do the contract work and his inquiries related to the work or specifications, or merely the latter. The language of the court's opinion relating to "standing" to assert warranty theory, which was quoted above in the discussion of warranties in Chapter 1, suggests that the standing requirement as it relates to warranties is conjunctive; ie., a contractor will have to be both solicited and the inquiries must relate to the contract work before he will have standing to assert warranty theory. The exact scope of the standing requirement remains unclear in the court's opinion, however, as it relates to superior knowledge claims although symmetry between superior knowledge and warranty standing would be expected.

Despite the uncertainty whether standing to assert superior knowledge theory requires both a solicited contractor making inquiries regarding the contract work, or merely the

latter, Aerojet-General does clearly stand for the proposition that a contractor who is neither solicited nor making inquiries relating to the contract work will not have standing to assert superior knowledge theory. Aerojet-General, therefore, leaves a current dichotomy between the standing requirements for asserting the misrepresentation and superior knowledge doctrines. The discussion of the warranty section in Chapter 1 showed that although the court rejected plaintiff's standing to assert warranty theory because it was an unsolicited contractor and its inquiries did not relate to the contract work, it did recognize the contractor's standing in these circumstances in the case sub judice to assert misrepresentation; however, on essentially the same facts with the same contractor it rejected his right to assert the superior knowledge doctrine. In regard to this superior knowledge/misrepresentation dichotomy as it relates to standing, it should be noted the court did say in a footnote as to its recognition that the contractor had standing to assert misrepresentation theory that, "[w]e leave open the possibility that for a contract claim in circumstances like these, the general standard may be the still lower one of recklessness or gross neglignce or, perhaps, even of absence of [sic] any obligation at all." [226] Therefore, in the italicized language, the court recognized the possibility that in future cases there would be no standing to assert misrepresentation theory under the same circumstances present in that case. Also, the court disposed of the misrepresentation claims through the plaintiff's failure to

adequately establish the elements of misrepresentation; consequently, it was not faced with a case of an actionable misrepresentation where the contractor was entitled to recovery.

It can be argued, then, the current dichotomy between superior knowledge and misrepresentation standing is more ephemeral than real. This would be sensible since, whether a contractor is misled by an affirmative misrepresentation or a failure to reveal information, he may suffer equal harm. Moreover, both theories deal with the integrity of the communicative process in government contracting and with the government's obligation to deal with its contractors in good faith. Under all the circumstances, no sound justification exists for different standing requirements for the two theories.

In summary, then, Aerojet General seems to establish "standing" requirements for warranty theory where the contractor must show both that he was solicited to do the work by the government and his inquiries related to the contract work. The requirements for "standing" as it relates to superior knowledge claims are somewhat more vague but reason would seem to dictate they should be the same as for warranty theory. Finally, Aerojet-General recognized the right of the plaintiff to assert misrepresentation theory even though it was an unsolicited contractor and its inquiries did not relate to the contract work. However, this was most likely an ad hoc holding and the standing requirement for misrepresentation will

eventually be held to be the same as for superior knowledge.

In addition to standing, the contractor's superior knowledge claim may be defeated because the contract provisions place the risk of the unanticipated occurrence on him in such a way that the government is absolved of its responsibility for failing to disclose the knowledge it possessed. For example, in L'Enfant Plaza Properties, Inc. v. United States [227] the contractor had a lease agreement with the Redevelopment Land Agency, an instrumentality of the federal government, for a certain portion of the land in the L'Enfant Plaza complex in Washington D.C. upon which to build a hotel. When the contractor began construction of the hotel, he discovered that footings of a recently constructed government building adjacent to his site encroached on the land in such a way as to interfere with his construction and increase his costs substantially. The encroachment occurred during a period after the lease had been signed but before full possession of the leasehold had been obtained. The contractor brought suit asserting as one of his claims the government's failure to disclose the encroachment. The Court of Claims granted the government's motion to dismiss the claim since it sounded in tort and was beyond the court's jurisdiction. The court found that the terms of the lease placed the risk of trespass on the leasehold soley on the contractor after lease signature. The court concluded, therefore, that since the government absolved itself of any contractual responsibility under the lease for the trespass it had no duty in contract law to disclose the

encroachment and any cause of action remaining sounded in tort only. Likewise, in Shayne Brothers, Inc. v. United States [228] the contractor sued the government for damages on its refuse contract with a military installation. The contractor alleged the government failed to disclose it had been offered cheap incinerator rates for its trash by local county officials. Had the contractor known of the offer to the government by the county officials, it would have been able to dispose of the trash cheaper than it had otherwise done. The Court of Claims concluded the contractor could not complain about the witholding. It observed the contract made the contractor completely responsible for disposal of the trash and concommitantly absolved the government of any responsibility as to that matter. Under the circumstances, "the sole responsibility for disposing of the trash was on the plaintiff."[229]

These cases in the superior knowledge area[230] are like WRB Corporation v. United States discussed in the misrepresentation chapter. The contractual undertakings may be such that the contractor assumes all the risk of unanticipated difficulties as to a certain matter and absolves the government of any responsibility in the subject. Like misrepresentation, the superior knowledge doctrine will not operate to reallocate the risk under these circumstances since a specific contractual provision prevents it from doing so. Only where the contract does not specifically allocate all the risk to the contractor, will he be able to assert the superior knowledge doctrine to

reallocate the risk of unanticipated difficulties caused by the government's withholding of information.

The cases where the contractor does not have standing to assert the superior knowledge doctrine or where the contract prevents him from doing so because of specific risk allocation are very rare. The vast bulk of the cases involving litigation over the government's failure to disclose information revolve around one of the elements of superior knowledge. To recover for a failure to disclose superior knowledge, the contractor will need to establish that "vital" information was not disclosed, the contractor did not know or have reason to know of the information, the government knew or should have known of the information, the government knew or should have known of the information's significance to contract performance, the government knew or should have known of the contractor's ignorance and the failure to disclose the information caused the contractor to suffer detriment. These elements will be discussed in detail below. Subsequently, a discussion of available remedies once an actionable superior knowledge case has been shown will be undertaken.

B. Failure to Disclose Information Vital to Contract Performance

To establish an actionable superior knowledge case, the contractor must show that the government has failed to convey information that is vital to contract performance. This element plays the same role in superior knowledge as does the representation in misrepresentation. It is the central element

to which all the remaining elements relate. Like the representational element in misrepresentation, this element also conceptually has two subelements: a communicative subelement and an informational subelement. The failure to disclose the information constitutes the communicative subelement; the nature of the information withheld constitutes the informational subelement. These aspects of this element will be discussed in turn in this section.

1. Failure to Disclose

The first subelement the contractor must show is that the government has failed to convey, i.e., make a communicaton of, information to the contractor that it was under an obligation to reveal. This was established for superior knowledge cases by parts "iv" and "v" in the passage from the court's opinion in Helene Curtis Industries, Inc. v. United States quoted in the introduction to this paper. This is precisely the converse of the communicative subelement of the representation element in misrepresentation where it was stated the contractor must show the transmission of information to the contractor. This subelement--the failure to convey information versus the conveyance of information--is the heart of the difference between the superior knowledge and misrepresentation doctrines. Both deal with the communicative process but from different sides: superior knowledge concerns the failure to communicate when there is an obligation to do so whereas misrepresentation concerns a communication that is erroneous.

To establish a superior knowledge claim, then, the

contractor will have to show the government did not disclose information it was obligated to disclose. In most superior knowlege cases, this is not an issue because the government has not made a disclosure and this is very apparent to both parties. In these cases, then, the issues in contention between the parties concern one of the other elements of superior knowledge. In some cases, however, a dispute in regard to disclosure may exist between the parties. The dispute can be of two basic types: there can be a disagreement between the contractor and the government as to whether there has been a disclosure of any information to the contractor; even if the parties agree there has been a disclosure of information, they can disagree as to whether it suffices to meet the government's obligation under superior knowledge theory.

In regard to the type of dispute where the parties disagree over whether a disclosure of information has been made, the parties may differ over what words, or if any words, were used and communicated to the contractor. The government may be in the position of asserting certain words were used and communicated and the contractor may be denying this. This type of disagreement will not arise where the alleged communication took place in solicitation or contract documents because the documents will establish exactly what words were or were not used. This type of disagreement can arise, however, where the alleged communication was made apart from the documents such as at a bidder's conference. In this situation, evidence will be

taken on the issue of what words, if any, were employed and conveyed and findings of fact made.[231]

A dispute over whether there has been a disclosure of information also may center on whether a disclosure has been made indirectly. In this situation, the disclosure is not made directly in the solicitation or contract documents, or otherwise such as at a bidder's conference, but instead the contractor is referred to a source where he may obtain the information. The government, then, is asserting there has been a disclosure by reference but the contractor denies this. The rule in such situations is the contractor is responsible for all information to which he is clearly referred.[232] This rule may serve as a trap for an unwary contractor for it requires him to be alert to all references in the contract and at times the references can be subtle and less than explicit.[233] This area of disclosure by reference will be further discussed and illustrated in connection with the Hunt and Willet case in the reasonable reliance section below.

Once it has been determined there has been a disclosure of information and the words or information which comprise the disclosure, the second type of disagreement which may arise between the parties is whether the disclosure is sufficient to meet the government's obligation under superior knowledge theory. The general rule is that the government need not disclose everything it knows in detail; instead, it need only reveal enough information to give the contractor adequate warning that an investigation of the subject matter is in

order.[234] Under these circumstances, the contractor will then be imputed with all the knowledge reasonably discoverable as the result of this investigation which he has been warned he should make. A more detailed analysis of what constitutes an adequate disclosure will also be undertaken in the reasonable reliance section below.

Once the contractor has established there has been no disclosure or the disclosure does not suffice to satisfy the government's obligation under superior knowledge theory, he must then satisfy the informational subelement.

2. Vital Information

The courts and boards frequently say that the information which is not disclosed must be "vital."[235] This term is loosely used and is probably somewhat misleading. When used in superior knowledge cases the term vital may either refer to the requirement that the information be material or that it be factual in nature. The term "vital" is somewhat misleading because it is clear that information may be both factual and material and, therefore be actionable, but not be vital in the sense that contract performance is rendered utterly impossible without it. In fact, in most cases the information is not of this nature but rather the omission of the information results in contract performance being more expensive and difficult than anticipated but nevertheless feasible. The most sensible way to discuss the informational subelement is to examine its components without attaching labels which tend to skew or mask its meaning. Therefore, the

use of the word "vital" will be dropped. As the discussion below will demonstrate, the informational subelement in superior knowlege cases is the same as in misrepresentation; that is, the non-disclosure will not be actionable unless the information not disclosed is both material and factual in nature.

a. Materiality

The information which is not disclosed in superior knowledge cases has the same materiality requirement as in misrepresentation. Also, as in misrepresentation, the discussion of materiality in the superior knowledge cases is less than completely satisfactory because no case has been found which forthrightly analyzes the materialty requirement in all its ramifications. However, two cases, one where the information was found to be material and one where it was not, serve to illustrate with at least partial satisfaction the materiality requirement in superior knowledge.

In Oceanic Steamship Company v. United States, [236] a ship subsidy contract was involved. This is a contract whereby the government agrees to pay a subsidy to commercial ship owners and operators and in turn they agree to keep their ships under American registry and maintain shipping operations on certain routes with American crews. The subsidy is established by taking the comparable costs for foreign competitors on the same routes and paying the differential in operating costs to the American ship owner. In this case, the governmental agency involved did not reveal to the contractor that it had recent

information indicating that the contractor's competitors had been able to cut crew costs by using low paid labor from disadvantaged nations. The result was the contractor entered into a subsidy agreement lower than it was entitled to. When it discovered what had occurred, the contractor sought its damages. The Court of Claims found the contractor was entitled to recover under a superior knowledge theory and, as to the nature of the information witheld, commented the "information was critical...since it is most probable the plaintiff would not have agreed to the...1965 rates had it known of the data submitted."[237] The contract in Imperial Agriculture Corporation v. United States [238] called for the government to provide the contractor seed for a jute substitute called kenaf, the contractor was to cultivate the kenaf plants and in turn the government agreed to buy the seed from the kenaf crop. The only previous experience the government had in growing kenaf was two other plantings by a government researcher in Cuba; one of the Cuban plantings developed leaf discoloration in some of the plants which was due to a type of plant disease. When the contractor cultivated the kenaf plants, most of its crop was wiped out by the same disease. It brought suit because of the government's failure to disclose that kenaf was susceptible to disease. The Court of Claims denied recovery. One of its grounds for denial was the significance of the information:

> [I]t is not conceivable that either [the government] or plaintiff's representatives would have regarded those observations as significant. Plaintiff was no amateur. It was a large planter with varied experience in many countries. Like every planter, it

> was accustomed to taking risks of weather, insect pests and plant diseases. It would not have been frightened away from an important piece of business by the appearance, in another year and another country, of some discoloration in the leaves of an insignificant portion of a crop.[239]

The citations to other materiality cases are provided in the margin.[240]

These two cases illustrate that the materiality requirement for superior knowledge cases is the same as for misrepresentation. The information which is not disclosed must be of a nature that had it been disclosed a reasonable contractor would not have assented to the same contractual terms as he did in the absence of the information. This can be seen from the court's statement in Oceanic Steamship Company that the contractor most probably would not have agreed to the subsidy contract as proposed had it known of the information and the court's statement in Imperial Agriculture Corporation that had the contractor known of the information it would not have been dissuaded from consenting to the contract terms as proposed.

In this sense, then, materiality is closely related to the causation element discussed below because information which is material would normally cause contractor reliance if disclosed and information which is immaterial normally would not cause contractor reliance if disclosed. In fact, if information is found to be material, it is presumed it would have, in the absence of evidence to the contrary, caused reliance if revealed and, conversely, if it is immaterial it is

presumed it would not have, in the absence of contrary evidence, caused reliance if revealed.[241]

However, materiality goes beyond causation because the test is what a reasonable contractor would have done under the same circumstances not necessarily what the contractor in the specific case would have done. This can be inferred from the language quoted from the two cases above which shows the court judged what the contractor would have done had the information been disclosed by what was reasonable under the circumstances. Moreover, in regard to materiality, it has been noted by other authority where the fact "would not influence the reasonable man, either because of its triviality or because of its irrelevance to the subject dealt with, the law will ordinarily regard that fact as immaterial and reliance on it unjustified."[242] Materiality, therefore, provides the same threshold in superior knowledge cases as it does in misrepresentation; below this threshold information which would induce a specific contractor's reliance will not be actionable.

b. Factual Information

The information which is not disclosed must also be factual in nature or otherwise it will not be deemed actionable. Information which has been found not to be factual in nature, and therefore not actionable for purposes of superior knowledge, includes opinions,[243] speculation based on incomplete facts,[244] or expert conclusions predicated on a data base.[245]

A frequently occurring theme in this area surrounds the

experience of previous procurements. Many government contracts occur subsequent to prior procurements of the same item under identical or nearly identical specifications. Oftentimes, the previous contractor or contractors will have had problems with the performance of their contracts. The government, however, will at times omit reference in the solicitation for the current procurement to the problems under the previous procurement, the subsequent contractor will suffer difficulties and, when he discovers other contractors have had problems with the same procurement, will assert the government was obligated to reveal the prior procurement history. The rule in this area is well established that the government does not have to reveal general procurement history but only specific facts which the procurement history has brought to its attention and which contractors would find significant to contract performance.[246] In most of these cases, the prior history does not reveal one or a series of specific, useful facts but, rather, that the contract is on the whole complex, demanding and difficult to perform. This type of general information concerning the difficulty of contract performance, however, is not required to be disclosed[247] even though logically a good argument can be made that information of this type might be very useful to a contractor who undertook his obligations very cautiously.

The rationale behind this rule appears to be that where a procurement has had a troubled history, but the trouble is not due to one or a couple of discernible facts, requiring the

history to be revealed would amount to speculation that the next contractor was going to encounter difficulties. Moreover, it has been expressed that revealing the general complexity of a contract, in the absence of any specific facts which a contractor would find of aid in contract performance, would unnecessarily serve as a restraint on competition for government contracts by possibly dissuading qualified contractors from bidding.[248]

In conclusion, the discussion in this subsection illustrates that in superior knowledge cases for the government's failure to disclose information to be actionable the information must relate to factual matter. If the information has any element of speculation to it, and does not reflect what the government knows for certain to be fact, then the failure to disclose will not be actionable.

c. Rationale for the Materiality and Factual Matter Requirements

The rationale for the materiality and factual matter requirements in superior knowledge is not discussed in the cases but appears to be the same as in misrepresentation. These requirements are the result of a legal policy decision that certain information will not be actionable. The reasoning for this again seems to be two-fold. First, the capacity of non-factual and immaterial information to induce reliance is limited. Since the current context is a failure to disclose information, what is being said is that had the information been revealed it would probably not have induced the contractor

to change his course of action because of the information's nature as opinion or its immaterial character. Secondly, the administrative burden on the government would be intolerable if it were liable for the failure to disclose every piece of immaterial or speculative information in its possession. The administrative burden argument seems particularly appropriate in superior knowledge cases. In misrepresentation, the government's burden is controllable to some extent because it can define the relevant sphere of responsibility by determining what representations to make. In other words, it is not responsible for a representation unless it chooses to make an assertion. On the other hand, since superior knowledge cases do not deal with erroneous communications but instead the failure to communicate, the government cannot define its sphere of responsibility by choosing not to make an assertion. The sphere of responsibility is the limit of the information in the government's files and the heads of its employees. This can be very compendious and some way is needed to l t the responsibility to manageable proportions. The materiality and factual matter requirements do this.

The materiality and factual matter requirements of the informational subelement in superior knowledge cases serve, then, to restrict the reallocation of the risk from a fixed-price contractor to the government when unanticipated difficulties in contract performance arise from the government's failure to disclose information to situations where the reallocation is fair to both parties. In superior

knowledge cases, as in misrepresentation cases, this will be where the information is most likely to induce contractor reliance on one hand and is manageable by the government on the other.

C. Government Culpability

A bare witholding of factual information material to contract performance is not sufficient to establish a superior knowledge case; the contractor must also prove the remaining elements of superior knowledge.[249] The purpose of this section is to examine the requirement of government culpability as it exists in superior knowledge cases. By culpability, it is meant the witholding has not occurred because of unavoidable inadvertance or accident but through some degree of government fault.

The superior knowledge cases do not speak of culpability as such as often occurs in misrepresentation cases. Instead, the analysis in the cases focuses on whether discrete elements have been established in determining the entitlement of the contractor to recovery. However, conceptually the conjunction of three of these elements leads to the conclusion that to be actionable the government's failure to disclose information must occur under circumstances that are not innocent but are, instead, culpable. These elements are that the government knew or should have known of the information which was not disclosed, it knew or should have known of the contractor's ignorance of this information, and it knew or should have known of the significance of the information to contract performance. As a matter of reasoning, when these three elements are established, the culpability of the government has been shown since the witholding has occurred with some attendant guilty state of mind on the government's

part. These elements will be discussed in greater detail momentarily. Whether these elements are considered together under one topic as a finding of culpability for purposes of analysis as this paper does, or as separate discrete elements as the courts and boards do, the contractor must establish all three elements to prove a superior knowledge case.[250]

It should be noted at this point prior to a detailed discussion of the elements which comprise culpability that analytically the culpability requirement for superior knowledge is the same as for misrepresentation. For example, when the government knew of the information, the contractor's ignorance and the importance of the information to contract performance, then the withholding has occurred knowing the contractor would be misled. In the absence of contrary evidence, as was discussed above in misrepresentation, it can be argued that where the witholding has occurred knowingly then inferentially it has occurred with the intent to mislead. Where the government should have known of the information, the contractor's ignorance and the information's significance then the withholding has occurred with a lack of due care as to its consequences. That is, the witholding has occurred negligently. Just as in misrepresentation, as was discussed earlier, the states of mind which exist in between a knowing witholding and a witholding caused by a lack of due care--recklessness or gross negligence--should also suffice as culpability criteria.

It should also be noted that analytically the

culpability requirement arises from a conjunction of the three elements. For example, if the government knew of the information and the contractor's ignorance but did not know and should not have known of the information's importance to contract performance, then a failure to disclose the information would not be culpable because there is no guilty state of mind. Since the contractor must establish all three elements in a superior knowledge case, there would of course also be no actionable case shown under these circumstances. Moreover, there may be mixed mental states. For example, the government may have known of the information and the contractor's ignorance, not have known of the information's importance but the circumstances may be such that the government should have known of the information's importance. There is culpability under these circumstances but it is comprised of mixed mental states. Nevertheless, these mixed mental states would be adequate to entitle the contractor to recover under superior knowledge theory. In these circumstances, where there are mixed mental states, the witholding should be deemed to occur at the level of the lowest mental criteria since it is only the conjunction of the three elements which establish culpability. For example, where the government knew of the information and the contractor's ignorance, did not know of the information's significance to contract performance, but should have known this, then the witholding has occurred negligently, not knowingly.

With this analytical introduction to the topic, it is

now appropriate to examine the discrete elements of the culpability requirement in detail.

1. The Government Knew or Should Have Known of the Information Not Disclosed.

It is necessary to prove a case of superior knowledge that the contractor show the government knew or should have known of the information that was not disclosed. The passage given in the introduction to this paper from Helene Curtis Industries, Inc. v. United States referred to actual Army knowledge of the fact that grinding was necessary to the successful production of the disinfectant involved. In what amounts to probably a majority of the superior knowledge cases, the government has actual knowledge of the information it withholds.[251]

The Helene Curtis court also recognized, however, that this element can be established not only where the government had actual knowledge of the information but also where it should have had knowledge. For example, a second claim for non-disclosure was made by the contractor as it related to the government's knowledge of the practice of the supplier of the raw chemical which was turned into the disinfectant. It was necessary for the successful manufacture of the disinfectant that it not only be ground, but also that the batches that were ground be homogeneous. Unknown to the government or the contractor, the supplier would produce the batches of raw chemicals, which were homogeneous in themselves, and then mix the batches before shipment thus destroying their homogeneity.

The court found the government "did not know, or have reason to know, that [the supplier] was blending together different batches of chlormelamine"[252] and, therefore, did not fail to disclose any relevant information it possessed. The cases subsequent to Helene Curtis also recognize that this element will be satisfied not only when the government has actual knowledge but where it should have known of the information.[253] Establishing that the government should have known of the information is, of course, very fact dependent and will turn on an analysis of all the circumstances.[254]

One question that arises with some frequency in regard to this element is the responsibility of one federal agency for knowledge which it does not possess but which is possessed by another federal agency. Contractors in these circumstances will oftentimes assert that the agency which with it contracted was imputed with knowledge possessed by other agencies and, therefore, has failed to disclose information which it was obligated to reveal.

It is now well established that the mere fact two agencies are part of the same federal government will not in itself cause one to be imputed with knowledge possessed by the other. The lead case for this proposition is Bateson-Stolte, Inc. v. United States.[255] In this case, the Corps of Engineers contracted for a powerhouse and appurtenant structures along the Savannah river in South Carolina and Georgia. A week after the Corps contract was awarded the Atomic Energy Commission awarded a massive construction

contract for a site forty miles from the Corps site. The result was that the labor rates in the area were bid-up and Bateson-Stolte, Inc. had to pay rates much higher than originally anticipated. It brought suit complaining of the Corps failure to apprise it of the AEC project prior to bid. The Court of Claims observed, in regard to the assertion that the Corps was charged with knowledge of the AEC project since both agencies were part of the federal government, that:

> [I]n a business so vast as that engaged in by the United States Government, with its multitudinous departments, bureaus, and independent agencies, with various and sundry projects scattered all over the world, it is impossible for one department to know what another department is going to do. In such case, it seems unreasonable to charge one agency with knowledge of what another one is going to do. It would seem that defendant should be held liable only if the agency that dealt with plaintiff had knowledge of the impending employment of this huge labor force.[256]

The court proceeded to remand the case for fact finding because the Corps had done preliminary site surveys for the AEC on this project and there was the possiblity that it knew the AEC project was going to be located in the vicinity. The subsequent decision reveals that Corps had surveyed over 100 sites in thirteen states. The court concluded, therefore, that "neither the plaintiff nor the Corps of Engineers knew, or could have known through the exercise of reasonable diligence, that the new production plant of the Atomic Energy Commission would be located and constructed within the same geographical area that included the Clark Hill Project of the Corps of Engineers."[257]

The rule to be drawn from Bateson-Stolte from the passage just quoted as well as the facts of the case is that one agency that does not have actual knowledge of information possessed by another agency will not be imputed with that knowledge where each agency is independent and there is no special relationship between the agencies.[258] The question which remains is under what circumstances will a special relationship between agencies exist such that one agency will be deemed to know of information possessed by another.

One factor which has been relied on in analyzing this question is whether the agencies are part of the same functional organization. Where they are, it is reasoned that the organizational remoteness between the agencies is lessened and this augurs for imputation; on the other hand, where they are not has been used to find no imputation.[259] One of the difficulties with this factor of analysis is at what level of governmental organization is the line drawn. Many times the line of demarcation chosen for this determination is at the cabinet level as, for example, the Department of Defense.[260] Therefore, continuing the example, when the line is drawn at this point agencies within the Department of Defense will stand a greater chance of imputation between themselves than an agency in the Department and an agency in another cabinet level department.

It should be noted that no case has been discovered where being part of the same functional organization alone was found to be a sufficient basis upon which to impute knowledge

between separate agencies; this factor when used for the purpose of supporting imputation, consequently, is analyzed in conjunction with the other factors discussed below.[261] When subjected to scrutiny this makes sense. The fact agencies are part of the same functional organization in most instances contributes very little to effective analysis of whether one agency should be aware of knowledge possessed by another. For example, the Department of Defense is comprised of three military services each larger than the other cabinet level departments of the federal government and each with different histories, traditions, missions and physical areas of operation. To suppose that merely the fact each service is a component of the Department of Defense without more is a rational basis upon which to impute information from one to the other is sophistry.

A second, and more persuasive, technique of analysis which is used to determine if one agency should be imputed with knowledge of another is whether there exists a close working relationship between the agencies. For example, in L'Enfant Plaza Properties, Inc. v. United States, discussed above, the Court considered whether the Redevelopment Land Agency, the lessor, was imputed with knowledge of the trespass by the adjacent federal construction which was under the auspices of the General Services Administration. The following passage from the courts's opinion illustrates how this technique may be used to determine whether imputation is proper:

[H]ere, we see no ground for charging RLA with

> constructive knowledge of the activities of GSA's contractor. RLA and GSA are independent entities and have no connection, outside of the fact that both agencies were involved with the urban renewal development of the L'Enfant Plaza complex. There is nothing to show that RLA was required to supervise or control the actions of GSA's contractor....
>
> In particular, the Area Project Coordination Agreement and the lease provisions relating to it are not sufficient to create the kind of close relationship between GSA and RLA under which it would be appropriate to impute to the latter any knowledge which the former might have had of McShain's improper placement of the HUD Building footings....RLA's duties dealt primarily with coordinating construction schedules between redevelopers pursuant to a "critical path schedule" such that various phases of building were accomplished in an orderly, time-efficient manner. Neither the terms of section 208(b) nor the Coordinaton Agreement made RLA responsible to one redeveloper for the quality of work being done by another. It would be incorrect to construe the Coordinaton Agreement as extending overall supervisory authority to RLA.[262]

This case illustrates that a central focus of attention in analyzing whether imputation is proper is whether there is a close working relationship between the parties in regard to the general subject matter to which the contract relates. The case for imputation will even be stronger under these circumstances if one party has supervisory control over the other. The presence or absence of a working relationship, particularly where there is control, as a critical element of analysis is reflected in other cases in this area.[263] This case also, parenthetically, illustrates the first factor discussed above. That is, the court used the fact the RLA and GSA were not part of the same functional organization in support of its conclusion that imputation was not proper. In this regard, the RLA was an entity of the city government of Washington D.C. and

the GSA was an executive branch agency.

In addition to an organizational and working relationship between the agencies, other grounds may exist for imputing knowledge from one agency to another. For example, in one case an agency was imputed with the knowledge of another agency where the contractor in his contract proposal referenced and identified a report published by the non-contracting agency.[264] Under these circumstances, the board reasoned that the contracting agency should have inquired of the other agency regarding matters raised in the report, and had it done so, it would have been aware that some of the information it was providing bidders was not accurate. In this case, the agencies were also part of the same functional organization--the Air Force.

The rationale underlying these imputation cases remains largely unspoken in the published decisions. However, it appears that imputation will occur when the relationship between the agencies is such that it can be reasonably expected that the normal barriers to communication between bureaucratic organizations will be overcome to the extent that the agencies should be sharing information on the subject matter to which the contract relates. This is most likely to be found when the agencies are part of the same functional organization and some other factor exists such as a close working relationship between the agencies or one of the agencies is referred to the other with notice that relevant information may be discovered. When these conditions exist, one agency will be deemed to know

the information possessed by another.

Apart from imputation of knowledge between agencies, one case has also held that a federal agency is not imputed with knowledge developed by one of its employees during his off-duty hours. The board stated, "[t]o require the agency to canvass all of its employees to ascertain what information each has gleaned on his own before awarding a contract would, we think, stretch the Curtis doctrine beyond rational limits."[265]

A final comment should be made to this section. The rule of Bateson-Stolte cannot be used by one federal agency to avoid its obligation to disclose material factual information. This rule was set forth in J.A. Jones Construction Co. v. United States, [266] which factually is similar to Bateson-Stolte. In this case, the Corps of Engineers contracted on behalf of the Air Force for construction with the contractor at Cape Kennedy. The contract was the first in a series of contracts for a massive, high priority construction project relating to the intercontinental ballistic missile program. The nature of the program was not revealed by the Air Force to the contractor; moreover, because of the classified character of the program, the Corps was only given information on a "need to know" basis. Even though the Corps did the actual contracting, the Air Force determined the scope of the project, timing and number of individual projects and completion dates. The scope of the program caused labor rates to be bid-up and the contractor had to pay premium rates beyond

those anticipated in his bid to attract labor and he sued for his increased costs.

The government defended on the basis of Bateson-Stolte arguing that the Corps did not have actual knowledge of the scope of the program since the Air Force had not revealed the full extent of its plans and that the Corps could not be imputed with the Air Force's knowledge since each was a separate agency. Based on the facts, the court concluded the obligation of disclosure was not owed by the Corps, which was acting as a contracting agent for the Air Force, but by the Air Force as "the prinicipal, responsible to this contractor who was doing Air Force work in the area and was directly affected by Air Force actions and programming."[267] The court further concluded that the principal/agent relationship was reenforced by the fact both agencies were part of the same functional organization, the Department of Defense. The court found the Air Force could have met its obligation of disclosure, even though its plans for the ICBM project were classified, by revealing in general terms the need for premium rates or by negotiating an escalation clause into the contract.

The interesting fact about this case is it is not an imputation case although it could easily have been analyzed as such. The court did not find the Corps was imputed with the Air Force's knowledge but, rather, that the Air Force was the responsible agency for disclosures to the contractor because of the prinicipal/agent relationship. This case had the elements for imputation: both agencies were of the same functional

organization, the Department of Defense, and there was a close working relationship with elements of control and supervision. The court probably chose to deal with the case as it did because it did not desire to unravel the complexity of imputing one agency with the knowledge of another when at the time of the imputation the knowledge was highly classified for national security purposes.

2. The Government Knew or Should Have Known of the Contractor's Ignorance

The contractor is required to show not only that the government knew or should have known of the information that was not disclosed but also that the government knew or should have known of the contractor's ignorance of the information.[268] In the words of the court in J.A. Jones Construction Company v. United States, discussed above, the government's responsibility for this element is established when it "must have known, or at least should have understood, that contractors" would not possess the information.[269] Cases exist both where the government had actual knowledge of the contractor's ignorance, and also where it did not have actual knowledge but should have known of the contractor's ignorance.[270]

Various factors have been relied on by the courts and boards in determining whether the government had actual knowledge of the contractor's ignorance or should have known of the contractor's ignorance when actual knowledge is not shown. Most of these factors tend to be in the nature of

circumstantial evidence. For example, in Helene Curtis the court found the government knew the contractor was ignorant of the grinding requirement because the disinfectant was novel, had been developed as the result of a government research and development project (and, therefore, its properties were not common knowledge in the contractor's industry), and the bidding time was too short to allow bidders the opportunity to investigate properly this new product. As a matter of inference, then, from these circumstantial facts the court concluded the government had to have actual knowedge of the contractor's ignorance. Other cases employing similar logic have also found government knowledge of contractor ignorance when a newly developed product which is the result of government research and development is involved.[271] The rationale behind these cases is that since the information is held virtually exclusively by the government it is unreasonable for the government to assume the contractor would know of it. Conversely, the government has been held not to know of contractor ignorance where the information is available to the contractor through either sources in his industry,[273] or through a reasonable site inspection.[273] The assumption underlying these cases is the government is entitled to presume the contractor has informed himself from sources available to him and, therefore, has no reason to suspect the contractor's ignorance.[274] Moreover, a contractor's request for information may serve to apprise the government of his ignorance;[275] on the other hand, a failure of the contractor

to inquire may serve to confirm the government's belief that the contractor has obtained the information from sources available to him.[276] Likewise, a substantial underbid may apprise the government that the contractor does not possess some important information;[277] on the other hand, in one case the fact that the contractor had bid substantially higher than the government estimate confirmed the government's belief he was aware of water problems at the worksite.[278] Delivery of an unacceptable first article may also serve to place the government on notice of the contractor's ignorance of significant information.[279]

This discussion illustrates that the determination of whether the government knew or should have known of the contractor's ignorance is dependent on an examination of all the facts and circumstances. Moreover, it should be noted this element interfaces heavily with the element of reasonable reliance discussed below. That discussion will show that many of the same factors that are used in analyzing whether the contractor's reliance on the government's silence is reasonable or not are also used to determine whether the government knew or should have known of the contractor's ignorance. To briefly summarize the interface at this point, where there are no affirmative indications to the contrary such as a contractor request for information, an underbid, or a defective first article, the government may safely assume the contractor is aware of information which is available to him through reasonable investigation and inquiry; under the same

circumstances, that is if the information is available through investigation or inquiry, the contractor's reliance on the government's silence will not be deemed reasonable.

3. The Government Knew or Should Have Known of the Significance of the Information to Contract Performance

It is not sufficient that the government knew or should have known of the information withheld and of the contractor's ignorance of this information, but it is also necessary that the government knew or should have known of the significance of the information to contract performance.[280] In other words, the government must appreciate or should have appreciated the materiality of the information.

This requirement is implicit in the court's decision in Helene Curtis where it found the government was aware of the importance of the grinding requirement to the successful manufacture of the disinfectant. In another case already discussed, Imperial Agriculture Corporation v. United States, the court concluded not only was the information regarding the plant discoloration on a small part of the test planting in Cuba immaterial, but its significance was also not apparent to the government:

> Assuming that what Mr. Lynn [the government's researcher] in Cuba knew, the Government knew, its knowledge was that in an insignificant portion of a kenaf experimental planting, a discoloration at the tip of the leaves had occurred. It did not know that the plants were afflicted with Collectrichum hibisci or any other potentially ruinous disease. It knew that in a later planting in Cuba in 1950 no such discoloration occurred at the tips of the leaves.[281]

It is clear from this passage, that the court found that the government did not appreciate the significance of the discoloration nor should it have. Important to this conclusion, although unspoken, was probably the fact it would have taken a highly trained plant pathologist to recognize the significance of the leaf discoloration, which was training the government's researcher did not have.

In a more recent board decision, Bermite Division, [282] the contractor complained the government withheld information on the proper processes for making flares. The Armed Services Board found that when the contractor ran into difficulties it approached the government with the fact it believed the specifications were defective and the conversations between the government and the contractor focused on this issue. In fact, the contractor's difficulties did not lie with defective specifications but with the contractor's production methods. The board found under these circumstances that there was no failure to reveal superior knowledge on the government's part as to the proper production methods because the government did not appreciate the true source of the contractor's difficulties due to the contractor's insistence the specifications were defective. The board stated in regard to the element under discussion that "one factor to be considered in determining whether the Government had an obligation to provide information to the contractor is the Government's understanding of the importance of the information"[283] which, because of the facts of the case, had

not been shown.

It should be observed that whether the government knew or should have known of the information's significance to contract performance is not often litigated in superior knowledge cases. This is because once the government is shown to know or should have known of the information, its materiality is usually very clear.

D. The Failure to Disclose Must Cause Reliance

The discussion so far has focused on the requirement of the contractor to show that factual information material to contract performance was not disclosed, and that the government knew or should have known of the information, its significance to contract performance and the contractor's ignorance of the information. Additionally, to be entitled to recovery the contractor must show the remaining elements of superior knowledge. One of these elements is that the failure to disclose caused contractor reliance.

To establish causation, the contractor will have to show that had he been aware of the information he would have chosen a different course of action.[284] In the words of one recent board decision, the contractor will have to show "that it planned its operations in accordance with the information available to it and the withheld information would have caused it to have adopted a different approach."[285]

This requirement is illustrated by Helene Curtis Industries. As was discussed above, the contractor's second claim for failure to disclose information related to the practice of the supplier of the raw chemical to mix production batches before shipment. The court found that the government was not aware of this practice and, therefore, was not guilty of any failure to disclose information. However, the court did find that even though the government did not know of the cross-mixing of batches it did know that each individual production batch differed from the other and also knew that it

was important that the batches that were refined into the final product be homogeneous within themselves. Although these facts were not revealed to the contractor, the court found the failure to do so was not actionable because the information if revealed would not have assisted the contractor in discovering the cross-mixing of the batches by the supplier. The court was aided in its conclusion by the fact the contractor discovered soon after commencing contract performance that the production batches differed between each other and that it was necessary for each batch processed to be homogeneous within itself, but nevertheless did not discover for many more months the fact that the supplier was cross-mixing batches prior to shipment. Therefore, the facts possessed by the government if revealed would not have led to the discovery of the cross-mixing and, thus, would not have caused the contractor to adopt a different course of action toward contract performance.

A few words should be devoted to comparing the causation elements of superior knowledge and misrepresentation. It was discussed in the causation section in the misrepresentation chapter that the contractor had to show that the representation induced him to follow a course of action that he would not have otherwise followed. Because superior knowledge deals with the failure to communicate when there is an obligation to do so, and not an erroneous communication as in misrepresentation, the causation element in superior knowledge is precisely the converse of what it is in misrepresentation. That is, the essence of the contractor's

complaint in superior knowledge is not that he has followed a course of action he would not have otherwise followed based upon the inducement of a representation but, rather, that he has followed a course of action he would have normally followed, and the government should have prevented this by revealing facts known only to it which would have dissuaded the contractor from that course of action in favor of another.

The causation elements of both theories compare because the course of action the contractor would have followed in a superior knowledge case if apprised of the facts is the same as would have occurred in misrepresentation had it not been for the inducement of the false representation. That is, in most superior knowledge cases the contractor if apprised of the facts would have adjusted his bid accordingly;[286] in some cases he could have made a relatively cost free adjustment in performance;[287] in a few number of cases the contractor might not have bid at all.[288]

The causation element of both superior knowledge and misrepresentation also compare because the contractor will not be deemed to have been misled when he actually possesses the information withheld from him.[289] Helene Curtis Industries v. United States again illustrates this proposition. There were actually two contracts for disinfectant involved in this case with award occurring approximately six months apart. When the first contract was awarded, the contractor did not know of the grinding requirement; by the award of the second contract it had discovered the necessity for grinding. However, for some

inexplicable reason, it did not attempt to adjust or withdraw its bid on the second contract. The court concluded that the contractor under these circumstances was entitled to the additional costs for grinding incurred under the first contract but not under the second contract because "it was no longer misled."[290] The pattern of Helene Curtis, that is, where the contractor is denied recovery because it possesses the information not disclosed by the government, has been repeated in other cases.[291] The rationale in these superior knowledge cases for not finding reliance when the contractor possesses actual knowledge of the information withheld is the same as it is in misrepresentation: possession of the actual facts is persuasive evidence from which it may be inferred the contractor did not rely on the government's withholding.

It should be noted that a contractor will be deemed to know the information withheld by the government even if it does not have precisely all the information the government possesses as long as the information it does possess is sufficient to provide a generally accurate picture of the information withheld.[292]

Finally, the causation elements of superior knowledge and misrepresentation compare because of the requirement that the information withheld or represented be material. As was discussed above in this chapter in regard to materiality, information which is determined to be material to contract performance raises a presumption that it caused contractor reliance. Of course, in misrepresentation as discussed in

Chapter 1, information which is material and represented to the contractor also raises the presumption that it induced his reliance.

E. The Reasonableness of the Contractor's Reliance

It is not sufficient that the contractor show the government has failed to reveal material factual information, where the government knew or should have known of the information, the significance of the information to contract performance and the contractor's ignorance of the information, and the failure to disclose has caused the contractor to rely. The contractor must also establish that his reliance on the government's failure to disclose was reasonable.[293] By this, it is meant the contractor must show he had no reason to know of the information withheld by the government. This reasonable reliance element serves the same function in superior knowledge as it does in misrepresentation; that is, it acts defensively to prevent the reallocation of the risk from a fixed-price contractor to the government where unanticipated difficulties in contract performance are due to the government's failure to disclose information.

The differences between superior knowledge and misrepresentation theory become most evident in the subsequent discussion of the reasonable reliance element in this section. To summarize at this point, the discussion in the misrepresentation chapter revealed that the government's representation as to a matter relieved the contractor of the burden to investigate that matter unless the representation was

effectively disclaimed or there were affirmative indications providing a warning that inquiry was necessary. Because superior knowledge does not involve a representation, but rather the absence of any representation, there is no operative rule which relieves the contractor of the obligation to investigate all contingencies which may be reasonably involved in contract performance. Therefore, the courts and boards say the duty to investigate in superior knowledge cases is greater than in misrepresentation cases.[294] Moreover, the absence of a representation means that the nettlesome problems of disclaimers does not arise in superior knowledge cases as occurs in misrepresentation since there is nothing to disclaim. Additionally, the presence of an affirmative indication does not play the same significant role in superior knowledge as it does in misrepresentation since an affirmative indication of a potential trouble spot in a superior knowledge case merely serves to underscore the contractor's already existing duty to investigate. These various aspects of the reasonable reliance requirement in superior knowledge cases will be discussed in this section.

1. The General Rules Relating to Reasonable Reliance

The general rule which is followed in superior knowledge cases as it relates to reasonable reliance is that the contractor will be imputed with all the knowledge that could have been discovered as the result of a reasonable investigation of the matters related to contract performance.[295] As the Court of Claims has said in one case,

"the corollary of the Curtis rule is that the Government is under no duty to volunteer information in its files if the contractor can reasonably be expected to seek and obtain the facts elsewhere...."[296] Conceptually, this general rule means the contractor is responsible for two things: first, he must anticipate the potential trouble spots which may arise during contract performance; secondly, he must conduct an adequate investigation of these matters. If the information withheld was discoverable through investigation, the contractor's reliance on the government's failure to disclose the information will not be reasonable because he will be imputed with knowledge of the information; therefore, he will have failed to establish this element and he will not be able to recover under superior knowledge theory.[297]

Like all situations which impute knowledge on the basis of what should have been known, this element is very dependent on an analysis of all the facts and circumstances surrounding the contract. Whether the contractor's investigation has been adequate may depend on many things; included therein is his experience, the availability of the information sought, the time available for inquiry, and the presence of any affirmative factors giving warning of the need to investigate into a specific matter. These factors will be discussed in seriatim.

One factor taken into consideration by the courts and boards in determining whether an adequate investigation would lead a contractor to information withheld by the government is the contractor's experience. For example, in several cases the

contractor's previous experience through prior contracts relating to the same matter as the contract in question was utilized in reaching the conclusion the contractor should have been aware of the information withheld.[298] The rationale of these decisions is that because of his prior experience the contractor was in a particularly good position to ferret out on his own the information he claimed was improperly withheld. On the other hand, where the contractor had no prior experience, this factor has been used to determine that there was no reason to know of the information withheld.[299] The rationale of this line of decisions is that because of his lack of experience the contractor was in a poor position to ferret out on his own information that was withheld from him.

The contractor's prior contractual experience may also be such as to show that he should not have been aware of information that otherwise he would have been charged with. For example, in one case where a contractor enountered water in excavating for a sewer adjacent to a large bay the contractor was not charged with knowledge that water would be encountered during the digging (which was normal for work conducted next to sizeable bodies of water) because it recently had constructed another sewer in the immediate vicinity and encountered no water.[300]

The experience criteria does not relate merely to prior contracts, which is in the nature of lay experience, but also expertise from special training and education. For example, one case has held that a contractor should have been aware of

information because it had the in-house engineering expertise to duplicate the same analysis pursued by the government in discovering the information the contractor claimed was improperly withheld.[301]

Finally, contractor experience is not considered in a vacuum; rather, to be charged with knowledge because of its experience, the contractor's experience must pertain to the area to which the information withheld relates. For example, where the government withheld information which was the result of its research and development efforts, the contractor was deemed not to be responsible for knowing of the information since all its experience was in the production area.[302]

The rule to be drawn from these cases appears to be that an experienced contractor will be held to know information which a less experienced contractor will not be deemed to know. Although this may have some logic to it, as a matter of procurement policy it is not clear why this should be so. If an inexperienced bidder holds himself out as competent to perform a contract, which he in effect does when he bids on a job, then he should be judged by the standards of what the reasonably experienced contractor would know; likewise a contractor who is very experienced should not be held to a higher standard than exists for the reasonably experienced contractor. To hold otherwise, in effect makes the duty of disclosure a sliding scale with the duty rising in proportion to the relative incompetency of the contractor because of his inexperience.

Other factors besides experience enter into the determination of what a contractor should know from an adequate investigation. One factor which enters the equation is the availability of the information. Where the information is available to the contractor, he will be deemed to know it; where it is not, he will not be imputed with the knowledge. Availability, for example, is often cited as a factor in cases involving technical information. Thus, the contractor's superior knowledge claim has been denied where the technical information withheld from him was available as a matter of general knowledge in his industry,[303] or in the published technical and academic literature.[304] Moreover, these rules apply to more than technical information and, therefore, superior knowledge claims have been lost where the non-technical information withheld was available in the industry[305] or from other sources.[306] The rationale of these cases is that if information is readily available from sources at hand, then the contractor will be expected to avail himself of them; if it is not, the same expectations do not pertain.

Another factor which is involved in the determination of what a contractor will be deemed to know is the time available for investigation. Where the time between the solicitation and when the bids are due is short, a contractor's obligation to investigate is commensurately lessened.[307] The obvious reason for this rule is that the contractor may be expected only to do what is reasonable in the time alloted by

the government.

In addition to the factors discussed above, the contractor's obligation to conduct an investigation may be affected by the presence of an affirmative indication in the contracting environment which warns him to investigate certain matters in greater detail than he might otherwise do. The term affirmative indication is used in this context in the same manner as it was in misrepresentation. That is, an affirmative indication is something which exists in the contracting environment which warns the contractor of the need to inquire into a certain area.

One of the most frequent affirmative indications in superior knowledge cases which apprises a contractor to direct inquiries into a certain subject matter is language contained in the solicitation or contract documents. The Armed Services Board's decision in Kaufman DeDell Printing, Inc. [308] illustrates this well. The contract in this case was for uniquely designed and cut matchbooks which were used by Marine Corps recruiters for advertisement. The IFB contained a sample matchbook which stated on the inside cover, "The Jewelite Match, Manufactured by Universal Match, Pat.No. 137983." The contractor intended to actually procure the matchbooks from a manufacturer since it was only a printing and duplicating firm. Because of this, it forwarded the IFB prior to bidding to a matchbook manufacturer, Diamond, and obtained a quote for the manufacture of the books. After award, Diamond indicated because of the unique cut which required a special die it could

not in fact manufacture the books and withdrew its quote. The contractor then discovered because of the unique cut of the matchbook only one manufacturer, Universal, was capable of producing the item and Universal was unwilling to provide books to the contractor to fulfill the contract. The contract was terminated for default which the contractor appealed alleging that its default was caused by the government's failure to disclose that only one manufacturer was capable of producing the books. The board concluded that the contractor had not established a superior knowledge claim because "the legend and patent information on the sample matchbook cover alerted all potential bidders to the possibility that, at least in its development, something about it was unique to Universal."[309] Therefore, the board held the contractor thus warned was obligated to inquire specifically of Universal regarding available manufacturing techniques and equipment and, if it had done so, would have learned of the special die required. It should be observed that the board found despite the information on the cover that Universal did not have exclusive patent rights in the book's design.

The Kaufman DeDell case, and the others like it in this area which deal with warnings in the solicitaton or contract documents, reveal that the warning provided to the contractor need not specifically identify the information withheld but only must provide sufficient facts to apprise the contractor of the need to inquire further.[310] Thus, in another case, a provision in a contract to improve an electrical system at a

Naval yard which prohibited the mixing of copper and aluminum wire was held to be sufficient to warn the contractor the existing system possibly contained substantial amounts of copper wire.[311] Moreover, the warning provided does not need to be a model of clarity. This can be gleaned from the board's conclusion that the legend and patent information in the Kaufman DeDell case was adequate to warn the contractor it should make inquiries about the manufacturing techniques and equipment. Finally, Kaufman DeDell illustrates that an affirmative indication can raise the requirements for what otherwise may be an adequate investigation. For example, the contractor in this case before bidding sent the IFB to an experienced manufacturer of matchbooks and received a quote for their production. Under these circumstances, and in the absence of anything which counselled for a more detailed investigation, this would seem to constitute an adequate investigation of whether the matchbook was generally capable of manufacture. However, in the board's view the legend and patent information made a more detailed and comprehensive inquiry necessary.

Additionally, as another type of affirmative indication or warning sometimes contained in contract provisions, the type of specifications used by the government to describe the contract work in the solicitation or contract documents may suffice to give the contractor warning to investigate certain matters. For example, where the contractor's complaint is that the government has failed to

reveal the true nature and complexity of the work involved, it has been held that where the contract contains design and not performance specifications the contractor should have been aware of what was involved.[312]

Warnings may also be provided to the contractor by the government in other than the solicitation or contract documents. For example, in another case a notation placed on government approved shop drawings by government personnel that the contractor should check all field measurements was held sufficient to warn the contractor that the prefabricated bathtub wall liners he was to install in government housing would not fit because the bathtub faucets were at heights inconsistent with the liner design.[313] This case also illustrates a point just mentioned above in connection with the discussion of warnings provided by solicitation or contract documents which is to be effective a warning need not identify with precision the information withheld or be a model of clarity. The board in this case recognized this when it said "[i]t is unfortunate that the specific problem encountered by the government wasn't detailed with greater specificity" but it concluded "the government does not have a legal duty to share with the contractor every bit of information it has about the item in question."[314]

Additionally, the government may give warnings apart from the solicitation or contract documents in other ways. For example, the government's request for a bid confirmation has been held to warn the contractor that it has not fully

considered what would be involved in the performance under the contract.[315]

The cases discussed have dealt with affirmative indications where the government has provided a warning in the solicitation or contract documents or by some other means such as a notation on shop drawings or a bid confirmation request. As delphic as the warnings may be at times, these cases are distinguished by the fact the warning is provided directly to the contractor. Another type of affirmative indication where the government may be said to provide a warning to the contractor is when it refers him to other information which would apprise him of potential problems. In Hunt and Willet, Inc. v. United States, [316] for example, the contract was for dam construction. The work site was surrounded by a steep hill which was comprised of fractured and jointed rock. This caused excessive raveling which endangered the workmen below and caused the contractor to conduct scaling operations to dislodge rock that was sufficiently loose to fall on the work. The contractor claimed for his scaling costs alleging the government had withheld knowledge it had about the raveling problem but the Court of Claims held that the contractor should have been aware of the problem. Significant to this conclusion was a contract statement that fault and joint systems were known to exist but were not represented on the contract drawings. The court held that had the contractor pursued the reference to the government's knowledge of joint and fault systems it would have been provided a geologic report on the

structure of the slope which would have warned of the possibility of raveling. The court concluded the "contractor cannot call himself misled unless he has consulted the relevant Government information to which he is directed by the contract, specifications, and invitation to bid."[317] This rule, that reference to data existing outside the solicitation or contract documents is sufficient to impute the contractor with knowledge of the warnings provided therein, has been followed in other cases.[318]

It should be noted that affirmative indications will not be deemed to give the contractor notice of potential problems when the indications to be properly interpreted require expertise beyond that normally possessed by the contractor. For example, in one case a contractor was not deemed to be warned of possible water problems at an excavation site where the government boring logs revealed certain soil characteristics because to calculate water flow from these characteristics would have required scientific expertise and the use of permeability coefficients.[319]

It should also be observed that affirmative indications do not always work against the contractor's interest but may in fact be a two-edged sword. For example, in one case a contractor took over a contract from a defaulting competitor shortly after the contractor had submitted a bid on the contract but had lost the award to the competitor.[320] In the interim, from the time of commencement of performance to default, the government had made certain change orders which

had to be implemented by a certain date. Neither the government nor the defaulting competitor told the contractor of the change orders. When the contractor discovered the change orders soon after taking over the contract, it only had a short period of time remaining to implement them which caused it to make extraordinary efforts to meet the deadline. The contractor claimed for its extra costs in having to implement the change orders in minimum time alleging the government should have revealed the change orders prior to the contractor assuming the contract. The board found that the contractor was entitled to its extra costs under a superior knowledge theory. It observed that since the contractor was an unsuccessful bidder on the same contract and took over performance shortly after losing the award, he was entitled to assume the contract was the same as the one on which he bid unless there were indications to the contrary. This is an example, then, of where the absence of any affirmative indications' indicating otherwise made the contractor's lack of an investigation as to an assumed fact reasonable.

Another case concerned a contract to complete a vessel which had been damaged during construction by a hurricane.[321] A previous contract had been let to clean the vessel of storm debris in preparation for the completion contract. In bidding on the completion contract, the completion contractor inspected the vessel, after the clean-up contractor had finished, except for the piping which inspection was omitted because of the neat appearance of the vessel. When the completion contractor began

work, he discovered the clean-up contractor had not cleared sand and mud from the piping; moreover, he discovered the government's acceptance inspection under the clean-up contract had skipped the piping to save time. The contractor claimed for the added costs of cleaning the pipes alleging the government failed to reveal the cursory nature of its acceptance inspection which, if known, would have caused the contractor to inspect the piping. The board granted the claim and found that the contractor was not remiss in foregoing an inspection of the piping because the neat appearance of the vessel in conjunction with the fact that the clean-up contract had just been completed, and the work accepted thereunder, made it reasonable to conclude the piping was properly cleared. This case serves as an example, then, of how the presence of affirmative indications may relieve a contractor of the obligation to inquire.

These two cases illustrate what was said at the beginning of this section. Whether an investigation is deemed adequate will depend on all the facts and circumstances. Affirmative indications normally serve to warn the contractor he must investigate certain areas and, thereby, increase the obligation to inquire, but they may also in some instances work conversely to excuse an investigation into a matter.

2. Site Investigations

A few words should be devoted to the requirement of site investigations since so many contracts in the superior knowledge area concern construction, renovation or

rehabilitation work which is done on and involves government property. In these types of contracts, the general rule that a contractor asserting a superior knowledge claim must establish he has conducted a reasonable investigation of all matters relating to contract performance would in itself require that an investigation of the work site in regard to all pertinent aspects be conducted.[322] Nevertheless, the government generally supplements this obligation, as was discussed in the misrepresentation chapter, by placing a site investigation clause in the contract which requires the contractor to investigate the work site.[323] Effectively, then, whether the source of the duty is viewed as the general duty to investigate all matters relevant to contract performance imposed by superior knowledge theory or a specific contract clause, the contractor will be obligated to conduct a site inspection in these types of contracts to the extent it is pertinent to matters which may arise during contract performance.

The rules as to site inspections follow the rules discussed above which pertain to superior knowledge cases generally. Therefore, a contractor will be imputed with all knowledge which is discoverable through a reasonable site inspection and this will defeat his recovery under superior knowledge theory if the information he complains was withheld was thus discoverable.[324] The emphasis is on a <u>reasonable</u> site inspection. A reasonable site investigation may include not only an on scene examination, but inquiries made to individuals knowledgeable about the site.[325] On the other

hand, the contractor will only be imputed with knowledge that would be discoverable by an ordinary contractor and will not be deemed to know that which was only discoverable by an expert.[326] Moreover, the contractor will not be held responsible for latent or hidden problems,[327] problems where the bidding time is insufficient for adequate exploration,[328] or problems that are discoverable only through extraordinary and unreasonable effort.[329]

As was discussed above, the use of the standard site investigation clause does not appear to add anything to the contractor's already existing obligation under superior knowledge theory to conduct a reasonable investigation of the site of the work. However, the use of a non-standard site investigation clause may increase the requirement of what will constitute an adequate site investigation as is illustrated by Ambrose-Augusterfer Corporation v. United States. [330] The contract in this case was for the installation of central air conditioning in a very large post office. The post office contained five floors, a penthouse and a basement, each floor was four and one-half acres in area and the building contained approximately 20,000 light fixtures. The contract plans did not show that over two thousand light fixtures were attached to ducts that would have to be removed as part of the contract work to install the air conditioning system; therefore, the contractor did not anticipate having to remove, recircuit and rehang these fixtures as part of the air conditioning installation. The contract contained three separate provisions

admonishing that a site inspection be conducted. These clauses served to defeat the contractor's claim that the government had withheld superior knowledge about the necessary removal and reinstallation of the light fixtures. The Court of Claims observed in this respect:

> Involved here are three specific admonitions to investigate and determine building conditions at the site....[H]ere plaintiff was not confronted with only a boilerplate inspection provision concealed in a printed form, but was also enjoined specifically in two particular specification sections to investigate and determine building conditions.
>
> ...
>
> ...In this contract, the site inspection provisions were not inserted routinely as a matter of course, as we already stated. Accordingly, our expanded view of the purpose of a site inspection, in contrast to plaintiff's view, in the circumstances of this case is entirely permissible. Therefore, plaintiff, as the Board found, should have known about the fixture problem....[331]

The conclusion to be drawn from this case is that non-standard site inspection clauses which are prominently displayed will enhance the type of inspection that will be considered adequate under the circumstances. For example, it is somewhat dubious that even with the normal obligation to investigate in superior knowledge cases it would be expected the contractor would have picked out some 2,000 fixtures for removal, recircuiting and rehanging from approximately 20,000 fixtures located in a seven story building where each story covered acres of space. However, the passage above shows the unconventional use of the site investigation clauses in this case resulted in an "expanded view" of the site inspection requirements such that the contractor was expected to make a more strenuous

investigation than normal.

The Ambrose-Augusterfer case illustrates that the use of the site investigation clause in the way that was done in that case can result in an affirmative indication warning the contractor that his investigation must be conducted more carefully than normally. In essence, the site investigation clauses in this case and the way they were utilized resulted in a message to the contractor that the full scope of the work could only be totally appreciated from a detailed and comprehensive investigation of the work site above and beyond that which might otherwise be conducted. Moreover, this case is much like the Hunt and Willet case discussed above where the contract documents referred the contractor to other information which would warn him of potential problems in the performance of the contract. Here, the site investigation clauses referred the contractor to the work site for a full description and appreciation of the extent of the work involved under the contract.

3. Factors Affecting the General Reasonable Reliance Rules

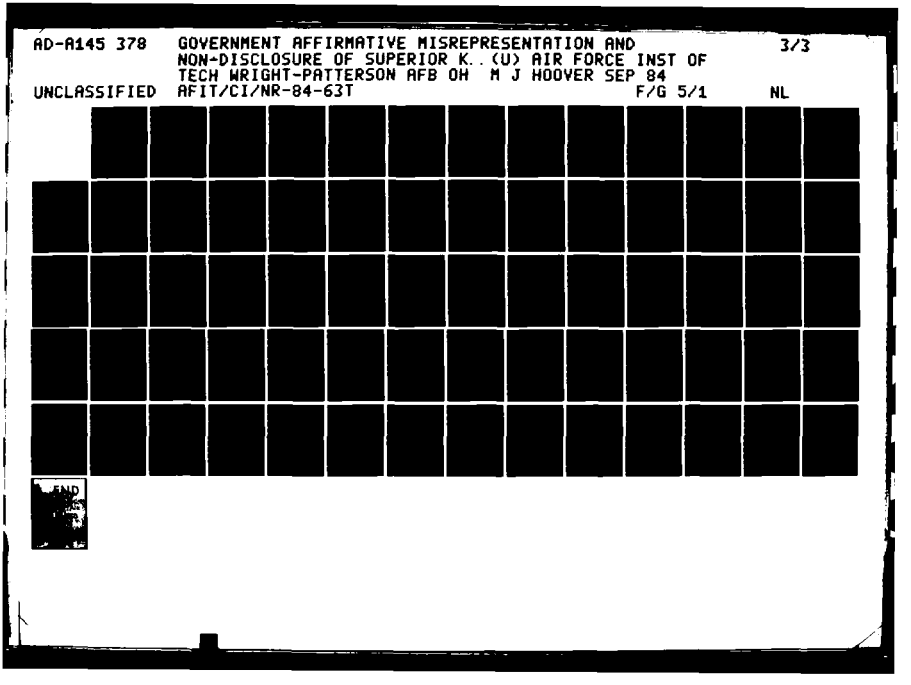
The rule in superior knowledge theory that the contractor's reliance on the government's failure to disclose information will not be held to be reasonable where the contractor has not made an investigation of all matters pertinent to contract performance, and the information was discoverable through such an investigation, may be altered in certain situations. The situations are where a representation is involved, a balancing between the failure to disclose and the contractor's failure to adequately investigate occurs and where an implied duty to communicate is found. These will be discussed in turn below.

In some respects, misrepresentation and superior knowledge can be considered different sides of the same coin. For example, in a case where there is an erroneous representation a court or board may choose to analyze the case using misrepresentation theory or, alternatively, treat the case as involving a government failure to disclose that the representation is false in which case superior knowledge theory is used. When a false representation is involved, misrepresentation is the proper theory to select and in the vast majority of cases this is how the facts will be analyzed. In some cases, however, superior knowledge may be selected as the theory. If this occurs, the question arises as to what impact the representation has on the contractor's general duty under superior knowledge to investigate matters relevant to contract performance. As the discussion in the

misrepresentation chapter revealed, a representation normally relieves the contractor of any obligation to investigate those matters as to which the representation relates; in superior knowledge, on the other hand since no representation is generally involved, the contractor is obligated to investigate all matters pertinent to contract performance. It is this dichotomy between misrepresentation and superior knowledge theory which comes to the forefront when a case which is properly analyzed in misrepresentation terms is decided using superior knowledge theory.

The rule that is followed when what is essentially a misrepresentation case is analyzed in superior knowledge terms is that the representation will generally relieve the contractor of his duty to inquire as to the matters represented to the same extent it does in misrepresentation. This is illustrated by two recent decisions.

In Lear Seigler, Inc., [332] the contract was for the manufacture of fighter wing tanks. The contract was a production contract following a research and development contract for the same item. The contract documents contained very specific drawings of the forgings for the wing tank frames which contained no notation of anything unique about their manufacture. Unknown to the production contractor, the previous research and development contractor had discovered the process used in making the frame forgings was so unique that it found it had to extend the state of the art in forging science to manufacture the tanks. Although the government knew this,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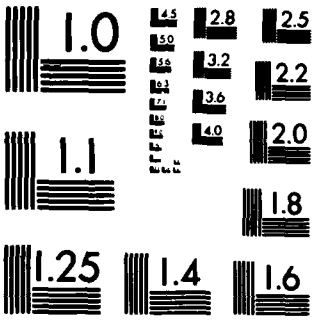

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it did not inform the production contractor. When the production contractor undertook to perform the production contract, he encountered the same difficulties and had to recreate the science used to produce the earlier tanks. The production contractor then made a claim for its increased costs employing superior knowledge theory alleging the government should have revealed the forging problems under the research and development contract. In addressing the question of whether the contractor should have been aware of this information, the Armed Services Board concluded "when viewed in the context of the government's detailed design of a product of which 1,000 had already been produced by GDC [the research and developement contractor] it is clear that appellant was not disposed to inquire of the existence of research and development problems."[333] The board found, in other words, that the detailed design contained in the contract drawings with no indication of unique production problems in the context of a follow on production contract impliedly represented the contract was a straight production contract. This implied representation relieved the contractor of the obligation to investigate to see if the facts were otherwise.

In Pacific Western Construction, Inc., [334] the contract was for road work. Part of the work required the contractor to provide suitable soil from a government pit for the road base. The contract documents contained representations that the soil was basically clay free which was necessary to make it suitable. In fact, this was not true as

the government representatives well knew. This fact could have been easily discovered by inquiries to other contractors who had used the pit for the same purposes or by a close examination of the pit itself, but the contractor did neither. When the contractor discovered he was using unsuitable soil, he had to repair part of the work already done and work was extended into another construction season because of delays. The contractor made a claim utilizing superior knowledge theory for its increased costs due to the government's failure to reveal the true nature of the soil in the pit. The Department of Transportation Board found that under the circumstances the contractor was entitled to recover and that it should not have known of the characteristics of the soils from the pit "[b]ecause the contract documents and soils data clearly indicated that clay was not a problem"[335] which relieved it of any obligation to pursue this matter.

These cases and others[336] illustrate that when a misrepresentation case is analyzed from a superior knowledge standpoint the element of reasonable reliance as it normally exists in superior knowledge will be altered to reflect the approach taken toward reasonable reliance in misrepresentation cases. That is, the contractor will normally be able to rely on what is represented without confirming its accuracy even though he has pursued a superior knowledge theory. This alteration is sensible because it adds logical symmetry to a superior knowledge case that should have been analyzed in misrepresentation terms to begin with.

Not only will the analysis of a case using superior knowledge theory that should have been analyzed using misrepresentation theory affect the usual rules as to what constitutes reasonable reliance in superior knowledge cases, but on occasion in superior knowledge cases an approach is taken toward the reasonable reliance element which balances it against the failure to disclose element again resulting in an alteration of the usual reasonable reliance rules.

A recent Armed Services Board decision in Joseph A. Cairone, Inc. reflects this.[337] The contractor in this case was to build foundations for a press and furnace at the Frankford Arsenal in Philadelphia, Pennsylvania. The bid package contained boring data which indicated water had been encountered at the site but the contractor, based upon his prior experience in construction in the area, decided that large amounts of water would not be a problem and did not pursue the warning provided by the boring data. In fact, the government knew for certain that a serious water problem existed in the area because of recent work done by another contractor, McFadden, Inc., just forty feet from the site where the foundations were to be constructed, but it did not inform the bidders of this. Once construction commenced, the contractor encountered water in such large quantities that it had to undertake expensive dewatering procedures to complete the work. It claimed for its added costs due to the dewatering on the theory that the government failed to reveal its superior knowledge about the extent of the water problem. The board

found entitlement to recovery. On the issue of the reasonableness of the contractor's reliance, the board observed that appellant should have made inquiries regarding the water problem given the information in the boring logs but concluded "that any duty to inquire on appellant's part is overcome by the Government's failure to alert bidders to the McFadden experience."[338] In other words, the board balanced the government's fault in not revealing the information with the contractor's fault in failing to make an adequate pre-bid investigation as normally required by the reasonable reliance element of superior knowledge theory.

The approach of the board in Cairone to balance the government's failure to disclose its information against the contractor's failure to investigate encompassed within the reasonable reliance element is reflected in other decisions in the superior knowledge area,[339] although the vast bulk of cases decided on superior knowledge theory treat the failure to disclose and reasonable reliance elements as distinct and do not attempt any balancing. The difficulty of Cairone and the other decisions like it is that by pitting the failure to disclose and the reasonable reliance elements against each other the reasonable reliance element is effectively eliminated from superior knowledge analysis. This is reflected by Cairone itself where some simple inquiries by the contractor of persons familiar with the site, such as previous contractors like McFadden, would have quickly revealed the water problem particularly where the boring data gave a clear warning that a

water problem possibly existed. The board in this case, moreover, and the other cases in this area provided above in the margin do not attempt to give any guidelines to determine when the government's failure to disclose might not overcome the contractor's lack of reasonable reliance and, therefore, when such a comparison is used as part of the analyis, it must be concluded that the reasonable reliance element will almost always be eliminated. The Cairone approach, then, would effectively relieve any contractor of the duty to inquire in superior knowledge cases and leave the government defenseless in situations where its failure to disclose could easily have been cured by due care on the contractor's part. Such a rule is undoubtedly at variance with what was intended by the Court of Claims in Helene Curtis and also leaves one with the uneasy feeling that it is not good procurement policy either.

Finally, in one recent decision by the General Services Board in Automated Services, Inc. [340] the reasonable reliance requirement normally applied to superior knowledge cases was extensively altered by a finding of an implied duty to communicate. This case involved a negotiated, fixed-price contract to create and analyze a data base from survey forms. When the contractor made his proposal, members of the evaluation board were hesitant about award to the contractor because they felt that award would over extend the contractor, which was a small operation, and that the contractor would encounter performance difficulties because of its proposed data management system which was at variance with what previous

contractors had used in performing the same contract. In these regards, the contractor was contacted as to whether it had allocated sufficient resources in terms of labor and computer time to perform the contract and the RFP referred the bidders to the data management systems that had been successfully used by other contractors in previously performing the contract. Despite the reservations, however, award was made to the contractor. The fears of the agency came to pass and the contractor suffered a default termination which he appealed alleging the government failed to reveal its superior knowledge in the form of its misgivings.

The board recognized that the doctrine of Helene Curtis was not applicable to these facts because the contractor should have known of the possible problems from the information and warnings provided regarding its deficiencies and the deficiencies of its proposed system. Nevertheless, the board found that the doctrine of Helene Curtis was predicated on an implied duty to cooperate and this implied duty of cooperation also gave rise to an implied duty to communicate under these circumstances such that all the reservations of the government should have been expressed to the contractor. The board stated "there is an implied duty upon all parties to 'lay their cards on the table' in the negotiation or bidding process, viz., a duty of communication, which when complied with, would have a salutary effect on the entire procurement from its inception."[341] The board concluded, therefore, that the default termination should be converted to a termination for

convenience.

Although the board claimed not to be applying the superior knowledge doctrine, the source, utility and similarities between the government's implied duty to disclose information underlying superior knowledge theory and the implied duty to communicate found by the board in this case are so close that the effect of this opinion is to remake the doctrine of Helene Curtis. In other words, this theory of an implied duty to communicate would appear to be applicable to precisely the same type of fact settings as would superior knowledge--that is, situations where the government has not disclosed information in its possession. This being so, it is apparent that this implied duty to communicate works major changes in superior knowledge theory. For example, in regard to the reasonable reliance requirement there is no doubt the contractor in this case should have been aware of the potential problems he faced. One of the problems related to his own capabilities in terms of labor and time which he, not the government, should have been the best judge of. That the contractor should have been aware of this problem is further underscored by the government's warning that it felt the contractor might be overextending himself by accepting the contract. Another problem related to the contractor's proposed data management system where again he should have been in the best position to understand his own system's strengths and weaknesses. And here again the contractor was provided specific references in the RFP to different successful systems

used by other contractors which should have alerted him to the potential difficulties he might encounter by attempting to use an untried system. Therefore, under the reasonable reliance requirement of superior knowledge this contractor's pre-bid investigation of potential problems would not suffice. By recognizing a right to relief under a theory of an implied duty to communicate on the same facts, therefore, the board eliminated any reasonable reliance requirement. Moreover, the implied duty to communicate employed in this case holds the government liable for withholding information which comprises opinion and conjecture, and not fact, for this was clearly the nature of the information the board felt was wrongly withheld by the government. The earlier dicussion in this chapter set forth the requirement for superior knowledge that the information withheld must pertain to material fact and not opinion or conjecture. Therefore, the implied duty to communicate affects superior knowledge theory in the failure to disclose element as well as the reasonable reliance element.

The Automated Services, Inc. opinion if followed seems to possess the potential to create a great deal of trouble for the government. It is clear that it expands the concept of the superior knowledge doctrine, albeit in the guise of an implied duty to communicate, far beyond anything that was ever intended by the Court of Claims in Helene Curtis. The government's duty under this theory to supply all information no matter how opinionated or conjectural and the contractor's lack of responsibility for exercising any care under the circumstances

will serve to make the contracting process much more difficult and burdensome from the government's standpoint.

F. The Non-disclosure Must Cause Detriment

The final element the contractor must show to establish an actionable superior knowledge case is that the government's failure to disclose information has caused him to suffer detriment.[342] In the discussion of causation above, it was noted that to show causation the contractor will have to establish that he selected a course of action which was different from the course which would have been selected had the government revealed its knowledge. To establish detriment, therefore, the contractor will have to show that the course of action that was chosen was more costly than the course of action that would have been selected had the contractor known what the government knew.[343]

Generally, the detriment element of superior knowledge does not cause much litigaton. This is probably because once the contractor has shown the other elements of superior knowledge it is quite apparent that he has suffered detriment; the only question is the amount of increased costs suffered. This element, at times however, can produce problems for the contractor. For example, there may be a question as to whether the detriment was caused by the government's non-disclosure or by some other independent cause. Thus, in one case where the contractor alleged the contracting agency withheld its knowledge that another government agency was going to raise the guaranty rate on construction loans which allegedly caused the

contractor to pay higher interest rates than anticipated, the court found that the increased interest costs were not the result of the government raising the guaranty rate but the independent and simultaneous action of financial institutions in raising the amount of interest they charged for the loans.[344] The court concluded, therefore, that the contractor had not suffered any detriment from the government's withholding of its information. Moreover, the facts may be such that the detriment suffered by the contractor was caused in part by the government's failure to disclose its information and in part some other independent cause. For example, in the Pacific Western case, discussed above in the reasonable reliance section, the board found that part of the damages the contractor suffered were due to the government's failure to disclose the fact the soil in the pit contained clay making it unsuitable for road base; however, the board also found that the contractor's failure to maintain a testing program for the soil which was being removed from the pit contributed to the increased costs it suffered since had this been done the soil unsuitability would have been discovered much sooner than it was. Under these circumstances, the board apportioned the damages according to the cause concluding "that the respondent should bear those additional costs which would have been incurred if the presence of clays had been promptly discovered by a continuous inspection program, and all additional costs incurred thereafter should be borne by appellant."[345] Where it is concluded that the detriment suffered by the contractor

was caused in part by the government's failure to disclose information and in part by other causes, but the apportionment cannot be determined with precise accuracy, the contractor will not be denied recovery but, instead, "damages will be allowed as in the judgment of fair men resulted from the breach."[346] This is often referred to a "jury-verdict-type" decision and results in an approximation of damages being apportioned to each causation factor.

G. Remedies

Once the contractor has shown all the elements discussed above, he has established an actionable superior knowledge case. The remaining question to be addressed is what remedies are available to redress the harm suffered because of the government's failure to disclose its superior knowledge. The remedy situation parallels that which was discussed in the misrepresentation chapter. In some superior knowledge cases, the contractor has been able to complete contract performance despite the government's failure to disclose its knowledge but at a higher price than was originally anticipated. In this situation, the contractor will normally be seeking to recover the unanticipated performance costs. In other cases, however, the contractor may not have been able to complete performance and, therefore, he is seeking to overturn a default termination of the contract. Finally, the contractor may be seeking to avoid his obligations under a contract where he has not yet begun performance. Superior knowledge has been held to provide a remedy to the contractor in each of these situations.

If the contractor has been able to complete contract performance but at a higher price than anticipated, superior knowledge may provide monetary relief in one of two ways. When brought in a court of law, the breach of the implied duty to reveal relevant contractual information under superior knowledge theory has been held to be a breach of contract and a damage remedy is available.[347] However, as was discussed in the misrepresentation chapter, until the Contract Disputes Act

of 1978 the boards of contract appeals did not have breach of contract jurisdiction; moreover, cases that could be remedied under contract adjustment clauses had to be brought to the boards first with review of the record made at the board in a court of law. The question arose, then, as to whether an actionable superior knowledge case could be remedied under any of the standard contract adjustment clauses.

It is now well established that an actionable superior knowledge case may be remedied as a constructive change under the standard changes clause contained in all government contracts.[348] Even though the right to a constructive change for an actionable superior knowledge claim is well established, the theory upon which the constructive change is predicated is not as clear. In a number of cases, for example, the boards have recognized that the breach of the implied duty underlying superior knowledge theory will give an entitlement to a constructive change but they have not attempted to analyze any further the reason why the failure to disclose amounts to a change under the changes clause.[349] In other cases, the boards reason that the failure to disclose superior knowledge is a constructive change because the specifications are defective.[350] The rationale for this theory is that since the government has failed to disclose information that it was obligated to disclose and had the information been disclosed it would have been revealed in the contract specifications, the omission of the information from the specifications renders them defective.

In addition to the changes clause, the Differing Site Conditions clause may also provide a remedy in certain types of superior knowledge cases involving construction contracts. This clause was discussed at some length in the misrepresentation chapter. There it was observed that in the absence of any government investigation and guarantee of subsurface or latent physical conditions at a construction site the government could expect to pay a premium in the form of higher bid costs to cover the contingencies that unexpected difficulties might be encountered while working in the earth's crust. As a result, the government often makes its own investigations of the conditions and represents its findings in the solicitation documents and at the same time guarantees the contractor an equitable adjustment through the Differing Site Conditions clause for conditions that differ materially from those represented. However, there will be times when the government will not choose to make a representation concerning physical conditions at the site. In these circumstances, to avoid the premium that it might otherwise expect to pay in the form of higher bid costs to cover the risks, the government has guaranteed the contractor in the second part of the Differing Site Conditions clause an equitable adjustment for "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract."[351] The courts and boards have established that a condition will be considered "unknown and

unusual" if it is not discoverable by the contractor through a reasonable pre-bid inspection of the work site and appropriate inquiries.[352]

The second part of the Differing Site Conditions clause has obvious utility in remedying actionable superior knowledge claims regarding physical conditions at a construction site. Once a contractor is in a position to establish the elements of superior knowledge, including the fact the information he complains was not disclosed to him was not discoverable through a reasonable investigation, he has set forth a basis for recovery under the second part of the Differing Site Conditions clause. This is because for recovery under the second part of the Differing Site Conditions Clause the contractor must show that the condition was not discoverable through reasonable investigation, the contractor relied on the absence of any knowledge regarding the condition and the contractor's costs were increased because of the condition.[353] These elements are, of course, the same as the reasonable reliance, causation and detriment elements of superior knowledge.

A few words should be devoted to the overlay and respective utility of superior knowledge and the second part of the Differing Site Conditions clause as theories of recovery. To begin, to set forth a claim under the second part of the Differing Site Conditions clause a contractor will only need to show the three things just mentioned. Therefore, even though he has a perfectly good superior knowledge case, if he asserts his claim under Differing Site Conditions theory he will not

need to show the elements of non-disclosure or culpability that were discussed above in regard to superior knowledge. Moreover, the Differing Site Conditions clause also pertains to cases where there has been no government non-disclosure and, therefore, no actionable superior knowledge claim. For example, the Differing Site Conditions Clause will apply to cases where the government as well as the contractor was unaware of the physical condition at the site as long as the condition was unknown and unusual within the meaning of the clause.[354] Finally, the superior knowledge doctrine will apply to cases that the Differing Site Conditions clause is not applicable to; that is, superior knowledge as a theory is not restricted to unknown or unusual physical conditions at a construction site but is applicable to any contracting situation where the contractor can make out the elements previously discussed in this chapter.

As the discussion has already suggested, the cases reflect that the second part of the Differing Site Conditions clause is often used as a contract adjustment clause to remedy situations which would otherwise be asserted under superior knowledge theory when an unknown or unusual physical condition in a construction contract is concerned.[355]

Superior knowledge has also been remedied under the Suspension of Work clause where the government's failure to disclose the knowledge it possessed resulted in delays in the contractor's performance of the contract work.[356]

A superior knowledge claim, then, may be remedied under

several of the standard contract adjustment clauses found in government contracts. Since the Contract Disputes Act of 1978, the boards of contract appeals have had jurisdiction to hear breach of contract claims. While a contractor might prefer in some cases to elect to assert a breach of contract theory as a remedy for the government's failure to disclose superior knowledge, as opposed to an equitable adjustment because of the notice requirements under the clauses and the applicability of the cost principles to equitable adjustments, the Johnson and Son Erectors case discussed in the misrepresentation chapter in the remedies section would appear to preclude this election when a contract adjustment clause is available.

In addition to situations where the contractor has been able to complete the contract work, although at a higher price than anticipated because of the government's failure to disclose its superior knowledge, there are other instances where the contractor has not been able to perform the contract work and has suffered a default termination. Where the contractor is able to show that the default is due to the government's failure to disclose its superior knowledge, the default termination has been converted to a termination for convenience.[357] The theory underlying these cases seems to be that the contract is impossible to perform given the contractor's planned course of action in light of the information available to him which did not include the information withheld by the government. If the government had revealed its information, the contractor then would have been

able to make changes in his planned course of contract performance such that performance would have been possible or, alternatively, would have elected not to bid on the contract at all. Under these circumstances, the risk of impossibility lies with the government because of its failure to disclose the needed information and, therefore, the contractor's default is for causes beyond the contractor's control as that term is employed within the standard default clauses.

Besides a money remedy or serving as a means to convert a default termination into a convenience termination, superior knowledge may provide other avenues of relief. For example, in Hildebrand and Day [358] the contractor was entitled to recission of his contract when he discovered shortly after award and before commencement of performance that the area where the contract was to be performed had been sprayed by the government with a potentially dangerous chemical. The Agriculture Board of Contract Appeals observed that the non-disclosure created a voidable contract which gave the contractor the option of ratifying the contract and performing it or treating it as void in which case the contractor was entitled to be restored to the status quo ante. It appears from the facts and circumstances of this case for the right of recission to apply the information withheld must be material and the election to void the contract must be made immediately upon discovering the non-disclosure. If the election is not made immediately, the contractor runs the risk of affirming the contract through partial performance. Finally, the failure to

disclose information may be grounds upon which to cancel a solicitation.[359]

Footnotes

1. See, e.g., Oceanic Steamship Co. v. United States, 218 Ct. Cl. 87, 586 F.2d 774 (1978); Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 391, 172 F.Supp. 454, 457 (1961); RESTATEMENT (SECOND) OF CONTRACTS Section 161(b) (1979).

2. See, e.g., MacArthur Brothers Co. v. United States, 258 U.S. 6 (1922); United States v. Atlantic Dredging Co., 253 U.S. 1 (1920); Christie v. United States, 237 U.S. 234 (1915); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Stage Co., 199 U.S. 414 (1905); Ruff v. United States, 96 Ct. Cl. 148 (1942); Carlin Construction Co. v. United States, 92 Ct. Cl. 280 (1941); Blakeslee & Sons, Inc. v. United States, 89 Ct. Cl. 226 (1939); Levering & Garrigues Co. v. United States, 73 Ct. Cl. 567 (1932); Dunbar & Sullivan Dredging Co. v. United States, 65 Ct. Cl. 566 (1928).

3. See, e.g., Snyder-Lynch Motors, Inc. v. United States, 154 Ct. Cl. 476, 292 F.2d 907 (1961); Leal v. United States, 149 Ct. Cl. 445 (1960); Ragonese v. United States, 128 Ct. Cl. 156, 120 F.Supp. 768 (1954); General Casualty Co. v. United States, 130 Ct. Cl. 520, 127 F.Supp. 805 (1955); Potashnick v. United States, 123 Ct. Cl. 197, 105 F.Supp. 837 (1952); Carlin Construction Co. v. United States, Blakeslee & Sons, Inc. v. United States, supra note 2.

4. RESTATEMENT (SECOND) OF CONTRACTS Section 161 (1979).

5. 160 Ct. Cl. 437, 312 F.2d 774 (1963).

6. Id. at 442-3, 312 F.2d at 777.

7. A recent decision by the Department of Transportation Board in Pacific Western Construction, Inc, 82-2 BCA 16,045 (1982), recon. denied, 83-1 BCA 16,337 (1983), dealt with a non-disclosure of superior knowledge as "misrepresentation" apparently because of doubts that the Helene Curtis formulation was applicable to construction contracts as well as supply contracts. 82-2 BCA at 79,508 & n.12.

8. See, e.g., cases in notes 70-87, infra.

9. Id.

10. Id.

11. Id.

12. See, e.g., Caffall Brothers Forest Products, Inc. v. United States,__Ct. Cl.__, 678 F.2d 1071 (1982); Summit Timber Co. v. United States,__Ct. Cl.__, 677 F.2d 852 (1982); Timber Investors, Inc. v. United States, 218 Ct. Cl. 408, 587 F.2d 472 (1978); Sisk Drilling Co., 80-1 BCA 14,419 (1980); Robert

Canavero, 78-1 BCA 12,967 (1978).

13. 183 Ct. Cl. 409 (1968).

14. Id. at 641 (citations omitted).

15. Levering & Garrigues v. United States, supra note 2; Midland Land and Improvement Co. v. United States, 58 Ct. CL. 671 (1924).

16. RESTATEMENT (SECOND) OF CONTRACTS Section 159 (1979) states "[a] misrepresentation is an assertion that is not in accord with the facts."

17. Loesch v. United States, 227 Ct. Cl. 34, 645 F.2d 905 (1981); Scholes v. United States, 174 Ct. Cl. 1215, 357 F.2d 963 (1966).

18. RESTATEMENT (SECOND) OF CONTRACTS Section 159 (1979).

19. Compare RESTATEMENT (SECOND) OF CONTRACTS Section 159, comment c with Section 168, comment a (1979).

20. 81-2 BCA 15,411 (1981).

21. Id. at 76,355.

22. 228 Ct. Cl. 220, 654 F.2d 75 (1981).

23. See also MacArthur Brothers Co. v. United States, supra note 2.

24. Aerojet General Corp. v. United States, 199 Ct. Cl. 422, 467 F.2d 1293 (1972); Loesch v. United States, supra note 17; Fleischman, KG, 82-2 BCA Paragraph 16,097 (1982).

25. RESTATEMENT (SECOND) OF CONTRACTS Section 168 (1979).

25. Supra note 17.

27. Id. at 57, 645 F.2d at 922.

28. Supra note 24.

29. Supra note 24.

30. Id. at 431, 467 F.2d at 1299.

31. See, e.g., Tree Preservation Co. v. United States, 172 Ct. Cl. 577 (1965); Mallory Engineering, Inc., 82-1 BCA 15,613 (1982); Hyland Electrical Supply Co., 75-1 BCA 11,037 (1975).

32. Supra note 31.

33. Id. at 52,537.

34. Supra note 31.

35. Id. at 581.

36. RESTATEMENT (SECOND) OF TORTS Section 538 (1976).

37. RESTATEMENT (SECOND) OF CONTRACTS Section 167, comment b (1979).

38. James & Gray, Misrepresentation-Part II, 37 Md.L.Rev. 488, 498-99 (1977) (citations omitted); see also 12 Williston On Contracts, Section 1490 (3d ed. 1970); RESTATEMENT (SECOND) OF CONTRACTS Section 162 (1979).

39. See, e.g., cases in note 70-87, infra.

40. Id.

41. Id.

42. Id.

43. Id.

44. Id.

45. 75-2 BCA 11,576 (1975).

46. 186 Ct. Cl 499, 405 F.2d 1285 (1969).

47. See, e.g., Firestone Tire & Rubber Co. v. United States, 214 Ct. Cl. 457, 558 F.2d 577 (1977); Tree Preservation Co., supra note 31; Snyder-Lynch Motors, Inc. v. United States, supra note 3; A Rand Corp, supra note 45; Hyland Electrical Supply Co., supra note 31; Lear Seigler, Inc., 73-1 BCA 10,004 (1973); Bay Asphalt Paving Co., 77-1 CPD 469 (1977).

48. See, e.g. cases supra note 47.

49. 160 Ct. Cl. 357, 312 F.2d 408 (1963).

50. Id. at 365, 312 F.2d at 413; see also L.M. Jones v. United States, 178 Ct. Cl. 636 (1967).

51. Aerojet General Corp. v. United States, supra note 24; Tree Preservation Co. v. United States, supra note 31; Snyder-Lynch Motors, Inc. v. United States, supra note 3; Fleischman, KG, supra note 24; Lear Seigler, Inc., supra note 47.

52. Supra note 47.

53. See, e.g., United States v. Binghamton Construction Co., 347 U.S. 171 (1954); Clearwater Forest Industries, Inc. v. United States, 227 Ct. Cl. 386, 650 F.2d 233 (1981); Covco Hawaii Corp., 83-2 BCA 16,554 (1983); Maitland Brothers Construction Co., 83-1 BCA 16,434 (1983); W.G. Thompson, Inc., supra note 20; Construction Aggregate Corp., 81-1 BCA 14,855 (1981); Johnnie Quinn Painting & Decorating, 79-1 BCA 13,797 (1979); Blackhawk Heating and Plumbing Co., 75-1 BCA 11,261 (1975).

54. See, e.g., cases supra note 53; see also Caffall Brothers Forest Products v. United States, supra note 12.

55. See, e.g., Covco Hawaii Corp., supra note 53.

56. Id.

57. See, e.g., McGrew Brothers Sawmill, Inc. v. United States, 224 Ct. Cl. 740 (1980); Mandel v. United States, 424 F.2d 1252 (8th Cir. 1970); Womack v. United States, 182 Ct. Cl. 399, 389 F.2d 793 (1968).

58. See, e.g., cases supra note 57; see also Hollerbach v. United States, supra note 2.

59. McGrew Brothers Sawmill, Inc. v. United States, supra note 57, 224 Ct Cl. at 745.

60. See also cases supra notes 53-4.

61. MacArthur Brothers Co. v. United States, supra note 2; American Shipbuilding Co. v. United States, supra note 22; Mandel v. United States, supra, note 57; Everett Plywood and Door Corp. v. United States, 190 Ct. Cl. 80, 419 F.2d 425 (1969); Baifield Industries, Inc., 77-1 BCA 12,308 (1977).

62. See, e.g., Caffall Brothers Forest Products, Inc. v. United States, supra note 12; McGrew Brothers Sawmill, Inc. v. United States, supra note 57; Everett Plywood and Door Corp. v. United States, Baifield Industries, Inc., both supra note 61.

63. Supra note 62.

64. Supra note 50.

65. Supra note 61.

66. Frequently, timber contracts will require the contractor to construct roads in the cut area as partial payment for the timber taken. The actual contract process is complicated but basically the costs of the roads are amortized as the timber is cut.

67. McGrew Brothers Sawmill, Inc. v. United States, Mandel v.

United States, both supra note 57.

68. Supra note 12.

69. 176 Ct. Cl. 46, 361 F.2d 1000 (1966).

70. The cases set forth in this note are arranged by topic and arranged alphabetically within each topic for ease of reference. The first clause in each parenthetical pertains to the express representation made; the second clause relates to how the representation was made.

a. Representations as to amount of work to be done: Railroad Waterproofing Corp. v. United States, 133 Ct. Cl. 911, 137 F.Supp. 713 (1956) (number of lineal feet of joints to be repaired; contract specifications); Womack v. United States, supra note 57 (estimates were nearly 100% accurate; made during oral discussions after bid opening regarding plaintiff's willingness to extend bid acceptance time).

b. Representations as to the conditions at the work site:

1. boring data--Morrison Knudsen Co. v. United States, 170 Ct. Cl. 712, 345 F.2d 535 (1965) (no permafrost in borings; profile drawings); Potashnick v. United States, supra note 3 (borings showed sandstone when in fact granite was encountered; boring drawings); Scholes v. United States, supra note 17 (no boulders encountered in borings; boring logs); Virginia Engineering Co. v. United States, 101 Ct. Cl. 516 (1944) (level of water; contract drawings)

2. other representations in solicitation or contract drawings--American Structures, Inc., 75-1 BCA 11,283 (1975) (character of sewer; contract drawings); Ames-Ennis, Inc., 73-2 BCA 10,113 (1973) (location of water lines; contract specifications); Arcole Midwest Corp. v. United States, 125 Ct. Cl. 818, 113 F.Supp. 278 (1953) (availability of electric hook-up; contract specifications); Avino, Inc., 70-1 BCA 8077 (1970) (conduit would connect on inside face of building; contract drawing); Brand S. Roofing, 82-1 BCA 15,513 (1982) (length of buildings to be roofed; contract specifications); Chance Construction Co., Inc., 82-2 BCA 16,084 (1982) (crown on road; contract plans); Chris Berg v. United States, 186 Ct. Cl. 389, 404 F.2d 364 (1968) (work site not in typhoon zone; contract documents); Christie v. United States, supra note 2 (information revealed was as much as the government knew; contract specifications); Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1965) (size and location of items at construction site; contract plans); Dunbar & Sullivan Dredging Co. v. United States, supra note 2 (character of the material to be dredged; contract specifications); GTS Company, Inc., 78-2 BCA 13,424 (1978) (height of streambed; contract specifications); Kaplan, Inc., 82-1 BCA 15,503 (1982) (condition of fender piles; contract plans); Klefstad Engineering Co., Inc., 68-2 BCA 7254 (1968) (location of soffits; design drawings); Levering & Garriques Co. v. United States, supra note 2 (information obtained from academy public works officer was all the information the government had on

subsurface condition; contract specifications); Piccoult, 75-1 BCA 11,274 (1975) (ability to work around existing structures; solicitation documents); Raimonde Drilling Co., 83-1 BCA 16,294 (1983), Swinging Hoedads, 83-2 BCA 16,707 (1983) (site access; contract plans); Ruff v. United States, supra note 2 (presence of excavated basement; contract specifications); Spiers, Inc. v. United States, 155 Ct. Cl. 614 (1961) (measurements; contract specifications); Sturm Craft Company, Inc., 83-1 BCA 16,454 (1983) (thickness of concrete pad; contract drawings); Summit Timber Co. v. United States, supra note 12 (accuracy of boundary lines; prospectus and sale map).

c. Representations as to other matters affecting contract performance: A Rand Corp., supra note 45 (stakes represent correct site location; post-award site visit); Baifield Industries, Inc., supra note 61 (condition of equipment; solicitation documents); Bay Asphalt Paving Co., supra note 47 (seal coat requirement would be deleted from solicitation; from project engineer before award); Blackhawk Hotels Co., 68-2 BCA 7265 (1968) (applicability of minimum wage law; letter supplementing solicitation); California Shipbuilding and Dry Dock Co., 78-1 BCA 13,168 (1978) (location of removed items; contract specifications); Environmental Tectonics Corp., 79-1 BCA 13,796 (1979) (design details of communication system would meet performance specifications; during contract negotiations); Firestone Tire & Rubber Co. v. United States, supra note 47 (machinability of metal; at bidders' conference); Glasgow Associates v. United States, 203 Ct. Cl. 532, 495 F.2d 765

(1974) (current interest rate; solicitation documents); Holly Corporation, 83-1 BCA 16,327 (1983) (government fiscal problems straightened out; telegram exercising option); Hyland Electrical Supply Co., supra note 31 (presence of items with contractor's supplier; negotiation for contract modification); Laco Construction Co., 83-2 BCA 16,840 (1983) (reusability of removed doors; contract drawings); Lear Seigler, Inc., supra note 47 (availability of computer; contract negotiations); Meyerstein, Inc. v. United States, 133 Ct. Cl. 694, 137 F.Supp. 427 (1956) (amount of steel needed; outline drawing contained in solicitation); Sisk Drilling Co., supra note 12 (acquisition cost of surplus paint; solicitation documents); Snyder-Lynch Motors, Inc. v. United States, supra note 3 (cost of motor parts; contract negotiations); Thaihuat Engineering Co., 79-1 BCA 13,691 (1979) (government would pay severance pay as required by local law; letter regarding current contract and repeated during negotiations for contract extension); Tree Preservation Co. v. United States, supra note 31 (length of area to be cleared; negotiation conference); United States v. Stage Co., supra note 2 (number of stations to be served was two when in fact was four; advertisement for proposals).

d. Miscellaneous: Aerojet General Corp. v. United States, supra note 24 (contract completion and possibility of loss; during period that takeover of government contractor by plaintiff was occurring); Robert Canavero, supra note 12 (odometer reading on automobile for auction).

71. Blackhawk Heating and Plumbing Co., supra note 53.

72. Nichols Dynamics, Inc., 75-2 BCA 11,556 (1975).

73. Arcole Midwest Corp. v. United States, supra note 70; Bateson Company, 76-2 BCA 12,032 (1976); Entwistle Co., 76-1 BCA 11,732 (1976); Thurmount Construction Company, 69-1 BCA 7602 (1969); Cryo-Sonics, Inc., 66-2 BCA 5890 (1966).

74. Aerodex, Inc. v. United States, 189 Ct. Cl 344, 417 F.2d 1361 (1969).

75. Supra note 57.

76. Id. at 412, 389 F.2d at 801.

77. See also, Caffall Brothers Forest Products, Inc. v. United States and Timber Investors, Inc. v. United States both supra note 12; Murphy Construction Co., 79-1 BCA 13,836 (1979); Clearwater Forest Industries, Inc. v. United States, supra note 53; B & S Systems, Ltd., 81-1 BCA 15,037 (1981).

78. See, e.g., Mandel v. United States, supra note 57, and language in Caffall Brothers Forest Products, Inc. v. United States and Timber Investors, Inc. v. United States, both supra note 12 and Clearwater Forest Industries, Inc. v. United States, supra note 53.

79. Flores Drilling and Pump Co., 83-1 BCA 16,200 (1983); Murphy Construction Co., supra note 77.

80. Murphy Construction Co., supra note 77.

81. See, e.g., McGrew Brothers Sawmill, Inc. v. United States, Mandel v. United States, both supra note 57.

82. See, e.g., United States v. Atlantic Dredging Co. supra note 2; Mandel v. United States, supra note 57; Woodcrest Construction Co. v. United States, 187 Ct. Cl. 249, 408 F.2d 406 (1969); Leal v. United States, supra note 3.

83. 227 Ct. Cl. 120, 645 F.2d 934 (1981).

84. Id. at 142, 645 F.2d at 947.

85. 65-1 BCA 4628 (1965).

86. Id. at 22,106-7.

87. See also H. N. Bailey & Associates v. United States, 196 Ct. Cl. 166, 449 F.2d 376 (1971); Midvale-Heppenstall Co., 65-1 BCA 4629 (1965).

88. See, e.g., Caffall Brothers Forest Products, Inc. v.

United States, supra note 12; Webco Lumber, Inc. v. United States, __Ct. Cl.__, 677 F.2d 860 (1982); American Shipbuilding Co. v. United States, supra note 22; Everett Plywood and Door Corp. v. United States, supra note 61.

89. Supra note 70, 168 Ct. Cl. at 699.

90. Supra note 61, 190 Ct. Cl. at 88, 419 F.2d at 429.

91. UCC 2-313 (2) notes further that "a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty."

92. 12 Williston on Contracts, supra note 38 at 425.

93. 166 Ct. Cl. 347, 333 F.2d 867 (1964).

94. 194 Ct. Cl. 461, 439 F.2d 185 (1971).

95. Supra note 70, 168 Ct. Cl. at 699 (emphasis supplied).

96. Supra note 61, 190 Ct. Cl. at 92, 419 F.2d at 431 (emphasis supplied).

97. Supra note 70.

98. See, e.g., Webco Lumber, Co. v. United States, supra note

88; Baifield Industries, Inc., supra note 61.

99. James and Gray, Misrepresentation-Part I, 37 Md.L.Rev. 286, 300.

100. 12 Williston on Contracts, supra note 38 at 462.

101. Supra note 24, 199 Ct. Cl. at 429, 467 F.2d at 1297-8 (footnote omitted).

102. Id. at 430, 467 F.2d at 1298.

103. Id.

104. See also, Aerodex v. United States, supra note 74, finding recovery on a constructive change theory but also holding that recovery on the same facts could be had alternatively on breach of warranty or misrepresentation theory.

105. See, e.g., United States v. Binghamton Construction Co., supra note 53; United States v. Atlantic Dredging Co., supra note 2; Caffall Brothers Forest Products, Inc. v. United States, supra note 12; American Shipbuilding Co. v. United States, supra note 22; Clearwater Forest Industries, Inc. v. United States, supra note 53; McGrew Brothers Sawmill, Inc. v. United States, supra note 57; Aerodex v. United States, supra

note 74.

106. See, e.g., Summit Timber Co. v. United States, supra note 12; Loesch v. United States, supra note 17.

107. See, e.g., United States v. Atlantic Dredging Co., Hollerbach v. United States, both supra note 2; Aerodex, Inc. v. United States, supra note 74; Woodcrest Construction Co. v. United States, supra note 82; Scholes, Inc. v. United States, supra note 15; Railroad Waterproofing Corp. v. United States, supra note 70; Potashnick v. United States, supra note 3.

108. 12 Williston on Contracts, supra note 38 at 464 and James and Gray, Misrepresentation-Part I, 37 Md.L.Rev. 286, 301, adopt a similar formulation.

109. See, e.g., Spearin v. United States, 248 U.S. 132 (1918); S.W. Electronics & Manufacturing Corp. v. United States, 228 Ct. Cl. 333, 655 F.2d 1078 (1981); Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979); L.W. Foster v. United States, supra note 46.

110. See, e.g., Caffall Brothers Forest Products, Inc. v. United States, supra note 12; Clearwater Forest Industries Inc. v. United States, supra note 53; Timber Investors, Inc. v. United States, supra note 12; Flores Drilling and Pump Co., supra note 79; Murphy Construction Co., supra note 77.

111. RESTATEMENT, supra note 14; see also, Loesch v. United States, supra note 17; Midland Land and Improvement Co. v. United States, supra note 15; Comp.Gen. Dec. B-163923, unpub. (June 11, 1968).

112. Firestone Tire & Rubber Co. v. United States, supra note 47; Hyland Electrical Supply Co., supra note 31.

113. Midland Land and Improvement Co. v. United States, supra note 15.

114. See, e.g., cases in note 112.

115. Chris Berg v. United States, supra note 70.

116. Caffall Brothers Forest Products, Inc. v. United States, Timber Investors, Inc. v. United States, both supra note 12; Womack v. United States, supra note 57.

117. See, e.g., Chemical Technology, Inc. v. United States, supra note 83; Flores Pump and Drilling Co., supra note 79; Murphy Construction Co., supra note 77.

118. Supra note 15.

119. Id. at 683-4 (emphasis in the original).

120. Supra note 2, 65 Ct. Cl. at 578.

121. See, e.g. cases in note 117; see also, Lear Seigler, Inc., supra note 47.

122. Christie v. United States, supra note 2.

123. See, e.g., Christie v. United States, supra note 2; Loesch v. United States, supra note 17; Womack v. United States,supra note 57; Morrison-Knudsen Co. v. United States, supra note 70.

124. Supra note 70, 170 Ct. Cl. at 719, 345 F.2d at 539 (citation omitted).

125. Supra note 2.

126. See, e.g., Loesch v. United States, supra note 17; Glasgow Associates v. United States, supra note 70; Foster Construction C.A. & Williams Brothers Co. v. United States, 193 Ct. Cl. 587, 435 F.2d 873 (1970); Chris Berg v. United States, supra note 70; Womack v. United States, supra note 57.

127. Supra note 126, 193 Ct. Cl. at 602, 435 F.2d 880-1 (emphasis supplied).

128. Supra note 12.

129. Id. at__, 677 F.2d at 857 (emphasis in the original; citations omitted).

130. Timber Investors, Inc. v. United States, supra note 12, 218 Ct. Cl. at 415, n.2, 587 F.2d at 475, n.2.

131. California Shipbuilding and Dry Dock Co., supra note 70; see also, Morrison-Knudsen Co. v. United States, supra note 70.

132. Baifield Industries, Inc., supra note 61.

133. See e.g., Kaplan, Inc., Environmental Tectonics Corp, California Shipbuilding and Dry Dock Co., all supra note 70.

134. Supra note 70.

135. Id. at 64,370.

136. Loesch v. United States, supra note 17.

137. Timber Investors, Inc. v. United States, supra note 12.

138. Scholes v. United States, supra note 17; California Shipbuilding and Dry Dock Co., supra note 70.

139. See, e.g., United States v. Atlantic Dredging Co., Christie v. United States, Hollerbach v. United States, United States v. Stage Co., all supra note 2; Teledyne Lewisburg v. United States, 699 F.2d 1336 (Fed. Cir. 1983); Aerodex, Inc. v. United States, supra note 74; Chris Berg, Inc. v. United States, Dale Construction Co. v. United States, Railroad Waterproofing Corp. v. United States, Arcole Midwest Corp. v. United States, Virginia Engineering Co. v. United States, all supra note 70; Levering & Garriques Co. v. United States, Dunbar & Sullivan Dredging Co. v. United States, both supra note 2; Swinging Hoedads, supra note 70; Baifield Industries, Inc., supra note 61; Jack Piccoult, supra note 70; Nichols Dynamics, Inc., supra note 72; Norair Engineering Corp., 72-1 BCA 9305 (1972); Klefstad Engineering Co., supra note 70.

140. Supra note 2.

141. Id. at 172.

142. See, e.g. cases in note 139.

143. Id.

144. Id.

145. Id.

146. Supra note 70.

147. See also, Meyerstein, Inc. v. United States, supra note 70.

148. Glasgow v. United States, supra note 70.

149. Supra note 31.

150. See, e.g., Meyerstein, Inc. v. United States, supra note 70; Leal v. United States, supra note 3; Carlin Construction Co. v. United States, Blakeslee & Sons, Inc. v. United States, both supra note 2; Johnnie Quinn Painting & Decorating, supra note 53; Robert Canavero, supra note 12.

151. See, e.g., Leal v. United States, supra note 3.

152. See also Woodcrest Construction Co. v. United States, supra note 82; Leal v. United States, supra note 3.

153. Supra note 87.

154. Id. at 183, 449 F.2d at 386 (emphasis supplied).

155. See also, Rixon Electronics, Inc. v. United States, 210 Ct. Cl. 309, 536 F.2d 1345 (1976).

156. See, e.g., United States v. Spearin, supra note 109; Hollerbach v. United States, supra note 2; Aerodex v. United States, supra note 74; Fehlhaber Corp. v. United States, 138 Ct. Cl. 571 (1957).

157. See, e.g., United States v. Atlantic Dredging Co., Ruff v. United States, Levering & Garriques v. United States, all supra note 2; Morrison-Knudsen Co. v. United States, supra note 70.

158. See, e.g., Hollerbach v. United States, supra note 2; Webco Lumber, Inc. v. United States, supra note 88.

159. See, e.g., Baifield Industries, Inc., supra note 61.

160. See, e.g., United States v. Atlantic Dredging Co., supra note 2; United States v. Spearin, supra note 109; Hollerbach v. United States, supra note 2; Morrison-Knudsen Co. v. United States, supra note 70; Fehlhaber Corp. v. United States supra note 156; Virginia Engineering Co. v. United States, supra note 70; Levering & Garriques v. United States, supra note 2.

161. See,e.g., cases supra notes 156-60.

162. See, e.g., Baifield Industries, Inc., supra note 61.

163. Supra note 139.

164. Id. at 1342, n.14.

165. Id. at 1357 (footnote omitted).

166. See also, Baifield Industries, Inc., supra note 61.

167. Id. at 59,364.

168. Another excellent example of an effort to reconcile a representation with a disclaimer provision is the Court of Claims' decision in Thompson Ramo Wooldridge Inc. v. United States, 175 Ct. Cl. 527, 361 F.2d 222 (1966).

169. Schutt Construction Co. v. United States, 173 Ct. Cl. 836, 353 F.2d 1018 (1965); Hedin Construction Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235 (1965); Fehlhaber Corp. v. United States, supra note 156.

170. Morrison-Knudsen Co. v. United States, Dale Construction Corp. v. United States, both supra note 70.

171. Norair Engineering Corp., Jack Piccoult, both supra note 70.

172. Railroad Waterproofing Corp. v. United States, supra note

70; Schutt Construction Co. v. United States, supra note 169.

173. Garcia Concrete, Inc., 82-2 BCA 16,046 (1982).

174. See, e.g., cases in note 139; see also, United States v. Spearin, supra note 109; Woodcrest Construction Co. v. United States, supra note 82; United Contractors v. United States, 171 Ct. Cl. 151, 368 F.2d 585 (1966); Fehlhaber Corp. v. United States, supra note 156; Ruff v. United States, supra note 2; Minnis & Wright & Moody, 74-2 BCA 10,685 (1974).

175. See, e.g., Teledyne Lewisburg v. United States, supra note 139; Webco Lumber, Inc. v. United States, supra note 88; Rixon Electronics, Inc. v. United States, supra note 155; Sisk Drilling Co., supra note 12; Arvin Industries, 71-2 BCA 9143 (1971).

176. See, e.g., Teledyne Lewisburg v. United States, Webco Lumber, Inc. v. United States, Rixon Electronics, Inc. v. United States, Arvin Industries, all supra note 175; Spiers v. United States, supra note 70; Lang-Miller Development Co., 81-2 BCA 15,433 (1981).

177. See, e.g., cases in notes 150-1.

178. Id.

179. See, e.g., Arvin Industries, supra note 176.

180. See, e.g., Spiers v. United States, supra note 70.

181. See, e.g., Teledyne Lewisburg v. United States, supra note 139; see also Rixon Electronics, Inc. v. United States, supra note 155.

182. See, e.g., cases in note 139.

183. The current clause is in the Federal Acquisition Regulations, part 52.236-3.

184. See, e.g., cases in note 139; see also, Ruff v. United States, supra note 2; Brand S. Roofing, supra note 70; Rose Corp., 81-2 BCA 15,267 (1981).

185. Leal v. United States, supra note 3; W.G. Thompson, Inc., supra note 20; Robert Canavero, supra note 12; Avino, Inc., supra note 70.

186. See, e.g., Timber Investors, Inc. v. United States, supra note 12.

187. See, e.g., Levering & Garriques Co. v. United States, supra note 2.

188. See also, Glasgow Associates v. United States, supra note 70.

189. See, e.g., id., where the contractor agreed to submit the case to the court by stipulation but failed to stipulate facts adequate to prove causation which prompted a rebuke by the court.

190. See, e.g., Levering & Garriques v. United States, supra note 2.

191. See, e.g., United States v. Atlantic Dredging Co., Christie v. United States, Hollerbach v. United States, all supra note 2; Summit Timber Co. v. United States, supra note 12; Glasgow Associates v. United States, supra note 70; Aerodex, Inc. v. United States, supra note 74; Morrison-Knudsen Co. v. United States, supra note 70.

192. P.L. 95-563, 41 U.S.C. 601, et seq.

193. See, e.g., United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966).

194. Id.; see also United States v. Bianchi, 373 U.S. 709 (1963); United States v. Holpuch, 328 U.S. 234 (1946).

195. The current clauses are contained in the Federal

Acquisition Regulations, parts 52.243.1-5.

196. See, e.g., Aerodex v. United States, supra note 74; Maitland Brothers, supra note 53; Flores Pump and Drilling Co., supra note 79; Murphy Construction Co., supra note 77; California Shipbuilding and Dry Dock Co., supra note 70; Entwistle Co., supra note 73; Nichols Dynamics, Inc., supra note 72; Lear Seigler, Inc., supra note 47.

197. See, e.g., cases id.

198. See, e.g., cases id.

199. Federal Acquistion Regulations, part 52.236-2.

200. See generally United Contractors v. United States, supra note 174; Ruff v. United States, supra note 2; Pacific Western Construction, Inc., supra note 7.

201. See generally Foster Construction C.A. and Williams Brothers Co. v. United States, supra note 126; United Contractors v. United States, supra note 174.

202. See, e.g., cases in notes 200-01; see also Krause, 82-2 BCA 16,129 (1982); Titan Atlantic Construction Co, 82-2 BCA 15,808 (1982).

203. Id.

204. See, e.g., cases in note 200.

205. See, e.g., Morrison-Knudsen Co. v. United States, supra note 70; Promacs, 64 BCA 4016 (1964).

206. See, e.g, Raimonde Drilling Corp., Sturm Craft Co., Brand S. Roofing, Chance Construction Co, all supra note 70; G & H Construction Inc., 82-2 BCA 16,111 (1982); Garcia Concrete, Inc., supra note 173; Kaplan, Inc., supra note 70; Pacific Western Construction, Inc., supra note 7; Titan Atlantic Construction Co., supra note 202; American Structures, Inc., Jack Piccoult, both supra note 70; Norair Engineering Corp., supra note 139.

207. 81-1 BCA 15,082 (1981), aff'd, 30 CCF 70,001 (Ct. Cl. 1982).

208. Software Design, Inc., 83-1 BCA 16,260 (1983).

209. Hildebrand and Day, 83-1 BCA 16,321 (1983); Blackhawk Hotels Co., supra note 70; Bay Asphalt Paving Co., supra note 47.

210. Id.

211. Id.

212. Id.

213. See, e.g., United States v. Atlantic Dredging Co., supra note 2; Pacific Western Construction, Inc., supra note 7; Seven Sciences, Inc. 77-2 BCA 12,730 (1977).

214. Seven Sciences, Inc., supra note 213, at 61,877.

215. Blackhawk Hotels Co., supra note 70; Johnson Electronics, Inc., supra note 85.

216. Downtown Copy Center, 82-2 CPD 503 (1982).

217. Tree Preservation Co. v. United States, supra note 31; Crawford Paint Co., 74-2 CPD 273 (1974).

218. Summit Timber Co. v. United States, Timber Investors, Inc. v. United States, both supra note 12; Flippin Materials Co. v. United States, supra note 49; Lousianna-Pacific Corp., 81-1 BCA 14,928 (1981).

219. Virginia Engineering Corp. v. United States, supra note 70; L.Z. Hizer, 77-1 CPD 357 (1977); Crawford Paint Co., supra note 217; Morgan Roofing Co., 54 Comp. Gen. 497 (1974).

220. See, e.g., infra note 220.

221. Id.

222. The cases in this note are listed alphabetically for ease of reference except that like cases are grouped together; the parenthetical information refers to the facts the government failed to reveal: Anderson & Guerrero, 73-1 BCA 9802 (1973), Diversacon Industries, Inc., 75-1 BCA 11,059 (1975) (subsurface rock condition); Gordon H. Ball, Inc., 78-1 BCA 13,055 (1978), Weihncacht Construction, Inc., 75-1 BCA 11,069 (1975) (subsurface obstructions making construction more difficult); Blinderman Construction Co., 75-1 BCA 11,018 (1975) (depression in a roof to be repaired); Boland Machine and Manufacturing Co., 70-2 BCA 8556 (1970) (limited acceptance inspection conducted under prior prepatory contract); Joseph Cairone, Inc., 81-2 BCA 15,220 (1981), Commercial Mechanical Contractors, Inc., 83-2 BCA 16,768 (1983), Ragonese v. United States, supra note 3 (presence of subsurface water); G.W. Galloway Co., 77-2 BCA 12,640 (1977) (failure to reveal during production that production deficiency was normal); Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972) (weather and sea conditions at site); Helene Curtis Industries, Inc. v. United States, supra note 5, Midvale-Heppenstall Co., supra note 87, Lear Siegler, Inc., 81-2 BCA 15,372 (1981) (novel technical processes developed as a result of government research and development efforts);

Hildebrand and Day, supra note 209 (presence of potential harmful chemicals at site); ICA Southeast, Inc., 73-1 BCA 9969 (1973) (notice of change orders before novation); Inflated Products Co., 71-1 BCA 8861 (1971) (contractor misreading government design specifications during contract performance); Johnson Electronics, Inc., supra note 85 (contract required extensive research and development); Oceanic Steamship Co. v. United States, 218 Ct. Cl. 87, 586 F.2d 774 (1978) (new data base for ship subsidies); Pacific Western Construction, Inc., supra note 7, Seldo Company, Inc., 81-2 BCA 15,355 (1981) (soil characteristics); Patti Construction Co., 1964 BCA 4225 (1964) (design specifications for building needed to be changed); Preventi Med Corp., 79-2 BCA 14,089 (1979) (number of eligible employees for physical exam program); Ryan Aeronautical Co., 70-1 BCA 8287 (1970) (government specified guidance system inadequate to achieve performance specification); Telline Radio, Inc., 78-1 BCA 12,915 (1978) (government mandated connector needed crimping); Transdyne Corp., 70-2 BCA 8365 (1970) (why first article did not meet performance specifications).

223. See, e.g., cases id.

224. Id.

225. Supra note 24, 199 Ct. Cl. at 434, 467 F.2d at 1300-01.

226. Id. at 431, n. 6, 467 F.2d at 1298, n. 6.

227. 227 Ct. Cl. 1, 645 F.2d 886 (1981).

228. 134 Ct. Cl. 154, 137 F.Supp. 433 (1956).

229. Id. at 156, 137 F. Supp. at 435.

230. See also Sparkadyne, Inc., 71-1 BCA 8854 (1971).

231. See, e.g., Commercial Mechanical Contractors, Inc., supra note 222, LaPointe Industries, Inc. 78-2 BCA 13,444 (1978).

232. See, e.g., Ambrose Augusterfer Corp. v. United States, 184 Ct. Cl. 18, 394 F.2d 536 (1968); L.M. Jones Corp. v. United States, supra note 50; Hunt and Willett, Inc. v. United States, 168 Ct. Cl. 256, 351 F.2d 980 (1965); Carlin Construction Co. v. United States, Blakeslee & Sons, Inc. v. United States, both supra note 2; F.E. Constructors, 82-2 BCA 16,119 (1982).

233. See, e.g., Hunt and Willett, Inc. v. United States, supra note 232.

234. Compare Blinderman Construction Co., supra note 222, with McCain Trail Construction, 82-1 BCA 15,702 (1982), Lunseth Plumbing and Heating Co., 81-1 BCA 15,063 (1981), Wright Industries, Inc., 78-2 BCA 13,396 (1978), LaPointe Industries,

Inc., supra note 231, Kaufman DeDell Printing, Inc., 75-1 BCA 11,042 (1975).

235. See, e.g., Hardeman-Monier-Hutcherson v. United States, supra note 222; H.N. Bailey & Associates v. United States, supra note 87; Helene Curtis Industries, Inc. v. United States, supra note 5.

236. Supra note 222.

237. Id. at 119, 586 F.2d at 792.

238. 147 Ct. Cl. 532 (1959).

239. Id. at 538.

240. Petrofsky v. United States, 222 Ct. Cl. 450, 616 F.2d 494 (1980); Crum Construction Co., 83-2 BCA 16,596 (1983); Hildebrand and Day, supra note 209; Bermite Division, 77-2 BCA 12,675 (1977); Canadian Commercial Corp., 76-2 BCA 12,145 (1976); Tolis Cain Corp., 76-2 BCA 11,954 (1976); Power City Electric, Inc., 74-1 BCA 10,376 (1974).

241. See RESTATEMENT (SECOND) OF CONTRACTS, Section 167, comment b and illustrations thereto (1979).

242. James & Gray, supra note 38, at 498-99; see also,

RESTATEMENT (SECOND) OF TORTS Section 538 (1976); 12 Williston on Contracts, supra note 38, Section 1490, at 344.

243. LaPointe Industries, Inc., supra note 231.

244. Evans Reamer & Machine Co. v. United States, 181 Ct. Cl. 539, 386 F.2d 873 (1968); Kane & Son, Inc., 79-1 BCA 13,841 (1979).

245. L.M. Jones v. United States, supra note 50; Scholes v. United States, supra note 17.

246. American Shipbuilding Co. v. United States, supra note 22; Continental Rubber Works, 80-2 BCA 14,754 (1980); Wright Industries, Inc., supra note 234; Bermite Division, supra note 240; Tar Heel Engineering and Manufacturing Co., 72-1 BCA 9242 (1972); Industrial Electronics Hardware Corp., 68-1 BCA 6760 (1968).

247. See, e.g., cases supra note 246.

248. See American Shipbuilding Co. v. United States, supra note 22.

249. See, e.g., American Shipbuilding Co. v. United States, supra note 22; Piasecki Aircraft Corp. v. United States, 667 F.2d 50 (Ct. Cl. 1980); H.N. Bailey & Associates v. United

States, supra note 87; Ambrose-Augusterfer Corp. v. United States, supra note 232; J.A. Jones Construction Co. v. United States, 182 Ct. Cl. 615, 390 F.2d 886 (1968).

250. See,e.g., cases supra note 249; see also Imperial Agriculture Corp. v. United States, supra note 238; Lunseth Heating and Plumbing Co., supra note 234; Bermite Division, supra note 240.

251. See, e.g., Oceanic Steamship Co. v. United States, Hardeman-Monier-Hutcherson v. United States, Helene Curtis Industries v. United States, Joseph Cairone, Inc., Commercial Mechanical Contractors, Inc., ICA Southeast, Inc., Boland Machine & Manufacturing Co., Transdyne Corp., all supra note 222; Hunt and Willett, Inc. v. United States, supra note 232.

252. Supra note 5, 160 Ct. Cl. at 446, 312 F.2d at 779 (emphasis supplied).

253. See, e.g., Loesch v. United States, n.24, supra note 17; Minority Truckers, Inc., 80-1 BCA 14,416 (1980); Lear Seigler, Inc., supra note 222.

254. See, e.g., Greenbrier Industries, 81-1 BCA 14,982 (1981).

255. 145 Ct. Cl. 387 (1959).

256. Id. at 391-2.

257. 158 Ct. Cl. 455, 458-9 (1962).

258. See also S.T.G. Construction Co. v. United States, 157 Ct. Cl. 409 (1962).

259. Compare L.W. Foster Sportswear Co. v. United States, supra note 46, J.A. Jones Construction Co. v. United States, supra note 249, with, L'Enfant Plaza Properties, Inc. v. United States, supra note 227, S.T.G. Corp. v. United States, supra note 258, Bateson-Stolte, Inc. v. United States, supra note 255.

260. See, e.g., cases supra note 259.

261. See, e.g., L.W. Foster Sportswear Co. v. United States, supra note 46; see also J.A. Jones Construction Co. v. United States, supra note 249.

262. Supra note 227, 227 Ct. Cl. at 8, 645 F.2d at 890.

263. See, e.g., L.W. Foster Sportswear Co. v. United States, supra note 46; J.A. Jones Construction Co. v. United States, supra note 249; Unitec, Inc., 79-2 BCA 13,923 (1979).

264. Cryo-Sonics, Inc., 66-2 BCA 5890 (1966).

265. Value Engineering Co., 74-2 BCA 10,861, 51,666 (1974).

266. Supra note 249.

267. Id. at 627, 390 F.2d at 893.

268. See,e.g., American Shipbuilding Co. v. United States, supra note 22; J.A. Jones Construction Co. v. United States, supra note 249; Helene Curtis Industries v. United States, supra note 5.

269. Supra note 249, 182 Ct. Cl. at 622, 390 F.2d at 890.

270. Compare, e.g., Hardeman-Monier-Hutcherson v. United States, supra note 222, Helene Curtis Industries v. United States, supra note 5, with J.A. Jones Construction Co. v. United States, supra note 249.

271. See, e.g., Transdyne Corp., Ryan Aeronautical Co., both supra note 222; Midvale-Heppenstall Co., supra note 87.

272. See, e.g., Firestone Tire & Rubber Co. v. United States, supra note 47; Prestex, Inc., 81-1 BCA 14,882 (1981); LaPointe Industries, Inc., supra note 231.

273. Compare Ambrose-Augusterfer Corp. v. United States, supra

note 232, with Hardeman-Monier-Hutcherson v. United States, supra note 222.

274. American Shipbuilding Co. v. United States, supra note 5.

275. See, e.g., Hardeman-Monier-Hutcherson v. United States, supra note 222.

276. See, e.g., American Shipbuilding Co. v. United States, supra note 22.

277. Id.

278. Paso Constructors, Inc., 81-2 BCA 15,171 (1981).

279. See, e.g., Sparkadyne, Inc., supra note 230.

280. See, e.g., American Shipbuilding Co. v. United States, supra note 22; Imperial Agriculture Corp. v. United States, supra note 238; Lunseth Plumbing and Heating Co., supra note 234; Bermite Division, supra note 240.

281. Supra note 238, 147 Ct. Cl. at 537-38.

282. Supra note 240.

283. Id. at 61,508.

284. American Shipbuilding Co. v. United States, supra note 22; J.A. Jones Construction Co. v. United States, supra note 249; National Concrete and Foundation Co. v. United States, 170 Ct. Cl. 470 (1965); Helene Curtis Industries, Inc. v. United States, supra note 5; Pacific Western Construction, Inc., supra note 7.

285. Pacific Western Construction Inc., supra note 7, at 79,511.

286. See, e.g., cases supra note 284.

287. See, e.g., L.M. Jones Company, Inc. v. United States, supra note 50; Telline Radio, Inc., G.W. Calloway Co., ICA Southeast, Inc., Inflated Products Co., all supra note 222.

288. See, e.g., Hildebrand and Day, supra note 209; Johnson Electronics, Inc., supra note 85.

289. See, e.g., Helene Curtis Industries, Inc. v. United States, supra note 5; Pacific Western Construction, Inc., supra note 7; Paso Constructors, Inc., supra note 278; Wright Industries, Inc., supra note 234.

290. Supra note 5, 160 Ct. Cl. at 445, 312 F.2d at 779.

291. See, e.g., Petrofsky v. United States, supra note 240; Aerojet General Corp. v. United States, supra note 24; Murphy Construction Co., supra note 77.

292. See, e.g., Aerojet General Corp. v. United States, supra note 24.

293. See generally, Aerojet-General Corp. v. United States, supra note 24; H.N. Bailey & Associates v. United States, supra note 87; Ambrose-Augusterfer Corp. v. United States, supra note 232; Helene Curtis Industries, Inc. v. United States, supra note 5; Leal v. United States, Ragonese v. United States, both supra note 3; Pacific Western Construction, Inc., supra note 7; Murphy Construction Co., supra note 77.

294. See, e.g., S.T.G. Construction Co. v. United States, supra note 258; Commercial Mechanical Contractors, Inc., supra note 222.

295. See, e.g., cases supra note 293.

296. H.N. Bailey & Associates v. United States, supra note 87, 196 Ct Cl. at 178, 449 F.2d at 383.

297. See, e.g., cases supra note 293.

298. See, e.g., ACL-FILCO Corp., 83-2 BCA 16,613 (1983); Crum

Construction Co., 83-2 BCA 16,597 (1983); Ocean Electric Corp., 74-2 BCA 10,655 (1974).

299. See, e.g., Walters & Co., Inc., 81-1 BCA 15,008 (1981); Midvale-Heppenstall Co., supra note 87.

300. Ragonese v. United States, supra note 3.

301. Value Engineering Co., supra note 265.

302. Midvale-Heppenstall Co., supra note 87.

303. See, e.g., H.N. Bailey & Associates v. United States, supra note 87; Bermite Division, Canadian Commercial Corp., both supra note 240; Prestex, Inc., supra note 272; PRB Uniforms, Inc., 80-2 BCA 14,602 (1980); Flexible Hose Manufacturing Co., 79-1 BCA 13,764 (1979), aff'd, 4 Cl. Ct. 522 (1984); Wright Industries, Inc., supra note 234; B.F. Goodrich Co., 76-2 BCA 12,105 (1976); Celesco Industries, Inc., 76-1 BCA 11,766 (1976); Industrial Electronics Hardware Corp., supra note 246.

304. See, e.g., Firestone Tire & Rubber Co. v. United States, supra note 47; H.N. Bailey Associates v. United States, supra note 87; Canadian Commercial Corp., supra note 240; PRB Uniforms, supra note 303; Midvale-Heppenstall Co., supra note 87.

305. See, e.g., Glasgow Associates v. United States, supra note 70; Pacific Western Construction, Inc., supra note 7; Wright Industries, Inc., supra note 234.

306. See, e.g., Jet Power, Inc., 83-1 BCA 16,516 (1983); Diamond, Inc., 78-2 BCA 13,477 (1978); Baifield Industries, Inc., supra note 61.

307. See, e.g., Helene Curtis Industries, Inc. v. United States, supra note 5; Pacific Western Construction, Inc., supra note 7; Midvale-Heppenstall Co., supra note 87.

308. Supra note 234.

309. Id. at 52,550.

310. See, e.g. cases supra note 234; see also Crouse-Hinds Sepco Corp., 82-2 BCA 15,865 (1982); Ocean Electric Corp. supra note 298.

311. Ocean Electric Corp., supra note 298.

312. American Shipbuilding Co., supra note 5.

313. Lunseth Plumbing and Heating Co., supra note 234.

314. Id. at 74,505.

315. LaPointe Industries, Inc., supra note 231; Industrial Electronics Hardware Corp., supra note 246.

316. Supra note 232.

317. Id., 168 Ct. Cl. at 265, 351 F.2d at 986.

318. See, e.g., F.E. Constructors, supra note 232; McCain Trail Construction, supra note 234; Murphy Construction Co, supra note 77.

319. Cairone, Inc., supra note 222.

320. ICA Southeast, Inc., supra note 222.

321. Boland Machine & Manufacturing Co., supra note 222.

322. See, e.g., Ambrose-Augusterfer Corp. supra note 232.

323. Supra note 183.

324. See, e.g., National Concrete and Foundation Co. v. United States, supra note 284; S.T.G. Construction Co. v. United States, supra note 258; Ragonese v. United States, supra note 3; Jet Power, Inc, supra note 306; Pacific Western

Construction, Inc. supra note 7; Lang-Miller Development Co., 81-2 BCA 15,433 (1981); Biggers Construction Co., 81-1 BCA 14,848 (1981); Lunseth Heating and Plumbing Co., supra note 234; Tranco Industries, Inc., 78-2 BCA 13,307 (1978).

325. See, e.g., Hunt and Willet v. United States, supra note 232; S.T.G. Construction Co. v. United States, supra note 258.

326. See, e.g., Stock & Grove, Inc. v. United States, 204 Ct. Cl. 103, 493 F.2d 629 (1974); Pacific Western Construction, Inc., supra note 7; Cairone, Inc., supra note 222.

327. See, e.g., S.T.G. Construction Co. v. United States, supra note 258; Commercial Mechanical Contractors, Inc., Boland Machine & Manufacturing Co., Diversacon Industries, Inc., Weihnacht Construction, Inc., all supra note 222.

328. See, e.g., Commercial Mechanical Contractors, Inc., supra note 222; Pacific Western Construction, Inc., supra note 7.

329. See, e.g., Commercial Mechanical Contractors, Inc., supra note 222; Crum Construction Co., supra note 298.

330. Supra note 232.

331. Id., 184 Ct. Cl. at 34-5, 394 F.2d at 545-46.

332. Supra note 222.

333. Id. at 76,161.

334. Supra note 7.

335. Id. at 79,513.

336. See, e.g., Aerodex, Inc. v. United States, supra note 74; Johnson Electronics, Inc., supra note 85.

337. Supra note 222.

338. Id. at 75,368.

339. See, e.g., Commercial Mechanical Contractors, Inc., Diversacon Industries, Inc., both supra note 222; Power City Electric, Inc., supra note 240.

340. 81-2 BCA 15,303 (1981).

341. Id. at 75,766.

342. See, e.g., J.A. Jones Construction Co. v. United States, supra note 249; Pacific Western Construction, Inc., supra note 7.

343. See, e.g., id.

344. Glasgow Associates v. United States, supra note 70.

345. Supra note 7, at 79,515; see also, Cairone, Inc., supra note 222.

346. See, e.g., ICA Southeast, Inc., supra note 222.

347. See, e.g., Oceanic Steamship Co. v. United States, Hardeman-Monier-Hutcherson v. United States, both supra note 222; J.A. Jones Construction Co. v. United States, supra note 249; Helene Curtis Industries, Inc. v. United States, supra note 5; Ragonese v. United States, supra note 3; Pacific Western Construction, Inc., supra note 7; Murphy Construction Co., supra note 77.

348. See, e.g., Chemical Technology, Inc. v. United States, supra note 83; Johnson and Son Erectors, supra note 207; Kane & Son, Inc., supra note 244; Murphy Construction Co., supra note 77; General Precision, Inc., 70-1 BCA 8144 (1970); Telline Radio, Inc., ICA Southeast, Inc., Boland Machine and Manufacturing Co., all supra note 222.

349. See, e.g., Johnson and Son Erectors, Telline Radio, Inc., ICA Southeast, Inc., Boland Machine and Manufacturing Co., all supra note 348.

350. See, e.g., Chemical Technology, Inc. v. United States, Murphy Construction Co., General Precision, Inc., all supra note 348.

351. Supra note 199.

352. See, e.g., National Concrete and Foundation Co. v. United States, supra note 284; S.T.G. Construction Co. v. United States, supra note 258; Covco Hawaii Corp., supra note 53; Biggers Construction Co., supra note 324; Lunseth Heating and Plumbing Co., supra note 234; Kane & Son, Inc., supra note 244; Warren Painting Co., 74-2 BCA 10,834 (1974); Commercial Mechanical Contractors, Inc., Cairone, Inc., Weihncacht Construction, Inc., Blinderman Construction Co., Diversacon Industries, Inc., all supra note 222.

353. See, e.g., cases supra note 352.

354. See, e.g., National Concrete and Foundation Co. v. United States, S.T.G. Construction Co. v. United States, Covco Hawaii Corp., all supra note 352.

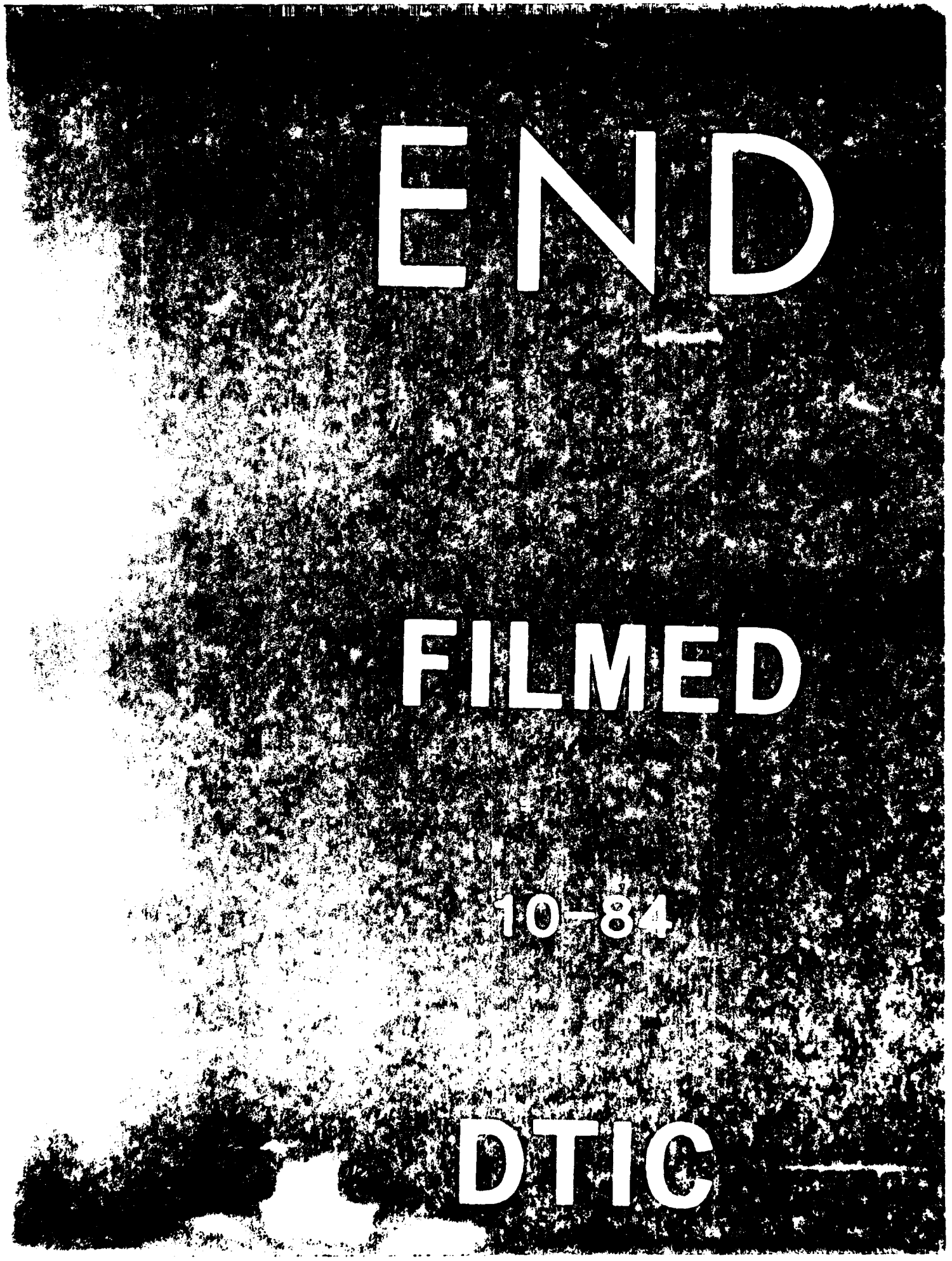
355. See, e.g., cases supra note 352.

356. Patti Construction Co., 1964 BCA 4225 (1964).

357. See, e.g., Preventi-Med Corp., Inflated Products Co., Transdyne Corp., Ryan Aeronautical Co., Johnson Electronics, Inc., all supra note 222.

358. Supra note 209.

359. Comp.Gen. Dec. B-177731, unpub. (October 30, 1973).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